United States Court of Appeals for the Second Circuit



APPENDIX

76-1570

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1570

UNITED STATES OF AMERICA,

Appellant,

-against-

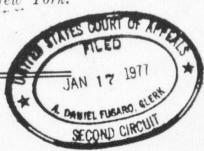
HENRY GOMEZ LONDONO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S APPENDIX

David G. Trager, United States Attorney, Eastern District of New York.



PAGINATION AS IN ORIGINAL COPY

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8-2-76	Before DOOLING J - case called - deft present - Inte sworn - deft will file motions to suppress within 2 apers 2 weeks later - deft waives right to Jury trie that stipulated facts are the record. If deft loses to intends to plead guilty at least to one count - proget to appeal	rpre week 1, a he m	s - Gov grees otion ving		e e e e e e e e e e e e e e e e e e e
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9/15/76	emorandum of law filed which is to be used during to suppress under Rule 41, F.R.CrP; and for trial puring	g the	motion		41
	Letter to Judge Dooling from Jefferey D. Ullman, Esq counsel for deft dated 9/3/76 filed.	100		l.	
	Affidavit for Search warrant from Robert Annunzito, Agent of the U.S. Customs Service filed.	Spec	ial		
0/6/76	tenographic transcript dated 9-1-76 filed. Letter to Judge Dooling form AUSA Fried, re: confirm of telephone conversation with Mr. Leavens, Law Clerkinformation on a memo of law; Letter filed.	atio c,adv	n isang		
10-12-76	Govts Memo of Law filed in opposition to motion to suppress (forwarded to Chamers). Letter filed received from chambers from AUSA = Kay Judge Dooling, re: motion to suppress by deft.	to			
11-8-76 B	efore DOOLING J - case called - Tena Kohn sworn as a interpreter - motion to suppress argued - decision r	eser	ved.		
11-15-76	Memorandum of Law filed and forwarded to Chambers. By EGOLING, J Ordered that defts motion to suppress defts statements of 2/22/76 and the physical evidence from the person of defendant and upon the execution were stated.	e ob	tained	• 	
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12-6-76	Stenographer's Transcript dated November 8, 1976 fil	ed.		4.	
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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against

HENRY GOMEZ LONDONO,

Defendant.

THE GRAND JURY CHARGES:

76 CR 153

INDICTMENT

Cr. No.
(T. 18, U.S.C., \$5922(e), 1001;
T. 31, U.S.C., \$51058, 1101(b)

MAR & 19/6

COUNT ONE

On or about the 22nd day of February 1976, while leaving the United States at the John F. Kennedy International Airport, within the Eastern District of New York, the defendant HENRY GOMEZ LONDONO, in a matter within the jurisdiction of the United States Department of the Treasury, Customs Service, knowingly and willfully did make a materially false, fraudulent, and fictitious oral declaration to agents of the United States Customs Service, in that the defendant HENRY GOMEZ LONDONO did knowingly and willfully falsely state that he was not carrying more than Five Thousand Dollars (\$5,000.00) in coins, currency, and negotiable instruments, when in truth and fact the defendant, HENRY GOMEZ LONDONO, knew that he was carrying Forty Seven Thousand Seven Hundred Eighty Dollars (\$47,780.00) in United States currency secreted in his luggage and baggage checked on board Avianca Airlines Flight Number 53. (Title 18, United States Code, Section 1001)

COUNT TWO

On or about the 22nd day of February 1976, within the Eastern District of New York, the defendant HENRY GOMEZ LONDONO, willfully transported and caused to be transported via Avianca Airlines Flight Number 53 from John F. Kennedy International Airport, Oueens, New York, within the United States, to Colombia, South America, the sum of Forty Four Thousand Savan Hundred Eighty Dollars (\$44,780.00) in United States currency, an amount

(4)

exceeding Five Thousand Dollars (\$5,000.00), the defendant having failed to file United States Government Form 4790, Report of International Transportation of Currency or Monetary Instruments in connection with the above transportation in violation of Title 31, United States Code, Section 1101(b) and Section 1058. COUNT THREE On or about the 22nd day of February 1976, within the Eastern District of New York, the defendant HENRY GOMEZ LONDONO knowingly delivered and naused to be delivered to Avianca Airlines Flight Number 53, a common carrier, one .38 caliber Smith and Wesson firearm Serial Number J284685 and one .38 caliber Colt Detective Special firearm Serial Number H52141 and ammunition secreted in one carton bearing the name Sony HP 319 stero music system, for transportation in foreign commerce from John F. Kennedy International Airport, Queens, New York to Colombia, South America, to persons other than licensed importers, licensed manufacturers, licensed dealers, or license, collectors, without written notice to Avianca Airlines that such firearms and ammunition were being transported, having knowingly failed to deliver said firearms and ammunition to the custody of the pilot, conductor, or operator of Avianca Airlines Flight Number 53. (Title 18, United States Code, Section 922(e)). A TRUE BILL. Joseph M. C. Mahoran EASTERN DISTRICT OF NEW YORK

-	A 6
2	UNITED CTATES DISTRICT COURT
3	EAGTERN DIGTRICT OF NEW TORK
4	
5	UNITED STATES OF AMERICA,
6	-against- : 76-CR-153
7	HENRY GOMEZ LONDONO,
8	Defendant.
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11	United Ctates Courthouse Brooklyn, New York
12	March 12, 1976
13	9:45 o'clock A.M.
14	
15	Before:
16	HONORABLE JOHN P. DOOLING, JR., U. C.D.J.
17	
18	
19	
20	
21	
22	•
23	MICHAEL PICOZZI OFFICIAL COURT REPORTER
24	

DAVID G. TRAGER, E°C.
United ctates Attorney
for the Eastern District of New York

BT: JEFFRET KAT, ECG. Assistant U.C. Attorney

IVAN . FICHER, ECC. Attorney for Defendant THE CLERK: For pleading, Henry Gomez Londono.

MR. KAT: Good morning, your Honor.

MR. FICHER: If your Honor pleases, this matter is on for arraignment before your Honor. The defendant has only a fleeting familiarity with English. I, however, have, through an interpreter, read literally every word of the indictment to him. On that representation, I ask permission to waive the reading of the indictment and enter in his behalf pleas of not guilty to each and every count of the three-count indictment.

THE COURT: Well, do you understand what Mr. Fisher was saying?

MR. FIGHER: He says to me, "No understand."

I think this may be my fault. Perhaps it's my
responsibility to have an interpreter here.

THE COURT: Why don't you see if we can get Mr. Rodriguez.

MR. PICHER: I am sorry, your Honor.

(Adjournment taken.)

LIBTA CLANCT, panish Interpreter, was sworn by the Clerk of the Court.

MR. FIGHER: If your Honor please, we have an application that all parties agreed to but may I

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repeat for the record my previous statement which —
the indictment is 76-CR-153, a three-count indictment
charging the defendant with various violations growing
out of his possession of certain quantities of money
at John P. Kennedy Airport. I have read to him with
the assistance of my interpreter at the Metropolitan
Correctional Center literally word for word and I have
discussed each of the counts at great length with the
defendant and for those reasons I am certain in my mind
the defendant is familiar with it and waives a detailed
reading of the indictment at this time and is fully
familiar with the indictment.

THE DEFENDANT: (Through Interpreter) Yes, of course.

THE COURT: You do not wish me to read the indictment to you?

THE DEPENDANT: No.

THE COURT: How do you plead, Mr. Londono, to the three counts in the indictment 76-CR-153, guilty or not guilty?

THE DEPENDANT: Not guilty.

THE COURT: The plea is entered. What is the date of arrest or what is our starting date?

MR. KAT: February 22nd, your Honor.

A 10 MR. PICHER: If your Honor pleases, there is a bail application which is a modification of the bail presently set with the --

THE COURT: What bail has been set?

MR. FIGHER: 75,000 security bond. This is of course the first time an application has been made in the District Court, the first time that I've appeared in the court for the defendant. The application is somewhat unusual, I think. What we propose to do with the Court's approval is sign a personal recognizance bond in the amount of \$75,000 assured by the defendant's rights, title and interest to the money which we admit was his.

THE COURT: which you believe is his?

MR. FICHER: That is the better word. The money totals some \$58,780. Your Honor is looking at the indictment -- there was an additional \$11,000 seized.

MR. KAY: On his person, your Honor.

THE COURT: Is that satisfactory?

MR. KAY: The problem the Government has is that the defendant --

MR. PICHER: I am sorry. I should state one other thing for the record. It is the clear understanding of myself and the defendant that in the event of any violation of the terms and conditions of the bail,

1 including I would suggest reporting to Probation once 2 a week in person and telephonically every day -- in 3 violation of any bail requirement, the defendan't bail 4 be forfeited and rights to the money be forfeited. 5 MR. KAT: The defendant, Mr. Londono, entered 6 the country December 13, 1975 and was arrested while 7 trying to leave on February 22, 1976. 8 Our knowledge is he has no jobhere, not family 9 or connection here. Our interest is not to see him 10 leave the country. Therefore, the only thing we have 11 to hold him here is the fifty-eight thousand dollars 12 and change. 13 MR. FICHER: I hope I will be able to persuade 14 the Government the defendant has no connections here. 15 THE COURT: I think he meant family 16 connections. 17 MR. FICHER: I am sure. 18 THE COURT: Not conspiratorial. 19 MR. KA": We are willing to accept this if the 20 Court is villing to go along with it. 21 THE COURT: I take it what we are talking about 22 is relief pursuant to cection 3146(A)(4) which 23 provides that he may be released upon the execution 24 of the bail bond either with a sufficient solvent 25 surety or deposit in cash in lieu thereof? I take it

12
in approximately the amount of the bond distinguished
from what would be the situation under (a)(3)?

MR. PICHER: Which is the ten per cent one?
That is not that.

THE COURT: In other words, this is in lieu of furnishing surety, he furnishes the assurance with United states currency?

MR. FIGHER: "es.

THE COURT: I take it there is the probability of a forfeiture provision hearing in the background if the Government is right in its assertion?

MR. KA": Yes.

THE COURT: We are doing this in the consciousness of that?

MR. PICHER: Tes.

THE COURT: All right, then the defendant will be released upon his execution of the bail bond in the amount of \$75,000 surety to be the deposit of cash in lieu of supplying the sufficient solvent surety.

All right. The conditions of release are that the defendant not leave the normal limits of bail for this Court which are the County of New York and the remaining counties in the Eastern District, Nassau, cuffolk, Richmond, Queens, and Brooklyn, and that he

1 13 report telephonically to the marshal's office daily 2 except ounday --3 THE MARCHAL: Caturday somebody will be here down in the pen. 5 THE COURT: Daily except ounday. And that he 6 report to the marshal's office in parson once each 7 week before ten o'clock in the morning and four o'clock 8 in the afternoon on Friday of each week. 9 MR. PICHER: Your Honor, anticipating a possible 10 problem before the Magistrate in executing the bond, 11 as your Honor's order reads, under these particular 12 circumstances the Covernment already has the money. 13 THE COURT: Well, ordinarily, the deposits of 14 cash are with the registry with the Clerk's Office. 15 If in this case the money is already in the secure 16 possession of the Customs cervice --17 MR. KAY: Yes. 18 THE COURT: I take it it is satisfactory if 19 they retain custody of it for this purpose so that they 20 must be notified that that is the situation. 21 MR. KAT: I will handle it, your Honor. 22 THE COURT: That is the condition on which they 23 are holding the cash and perhaps they can acknowledge 24 they are holding it by letter addressed to the 25

14 Magistrate with a copy to the United ctates Attorney 1 2 and defense counsel, if possible. 3 All right. MR. PICHER: Thank you, your Honor. Have a nice weekend. 5 THE COURT: I think we need to worry about the 6 trial date or do you want a discussion first? 7 MR. PICHER: Your Honor, it's quite possible 8 that two of the counts -- it's definite in my mind 9 that motions will be addressed to 1 and 2, 2 as a 10 matter of law and 1 as a matter of fact --11 THE COURT: It may be disposed of at pretrial --12 MR. FIGHER: Yes. I had nothing but 13 cooperation from the Assistant in this case on the 14 items of discovery and everything is refreshingly 15 open. I anticipate there is going to be an agreement 16 on a set of facts to supply to the Court with respect 17 to two counts. Thoughts with regard to the third count --18 THE COURT: Are rather different? 19 MR. FIGHER: Yes, unfortunately. In the 20 meanwhile, I ask for a trial date at any time 21 convenienc for the Court and the Covernment. 22 THE GOURT: We can certainly appreciate some 23 elbow room. 24 MR. KAT: I am assisting Mr. Gould in preparation 25

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of the opringfield case March 29th.

THE COURT: What we are thinking about is August 2nd.

MR. PICHER: That is quite all right.

THE COURT: Because we are pretty well jammed up

and we know we will be getting additional jail cases.

MR. KA": The Covernment has no objection.

MR. FIGHER: No objection by the defendant.

THE CLERK: What was the date?

MR. KAY: August 2nd.

MR. FIGHER: The record should reflect that the defendant consented to the August 2nd trial date.

THE CLERK: How much does Customs have?

MR. FICHER: \$58,780.

THE CLERK: That is the actual surety.

* * *

1	A 16
2	UNITED STATES DISTRICT COURT
3	EASTERN DISTRICT OF NEW YORK
4	x
5	UNITED STATES OF AMERICA :
6	against :
7	HENRY GOMEZ LONDONO, : 76 CR 153
8	Defendant:
9	X
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11	
12	United States Courthouse Brooklyn, New York
13	July 30, 1976 4:00 p.m.
14	
15	Before:
16	HONORABLE JOHN F. DOOLING,
17	U. S. D. J.
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22	
23	HENRY SHAPIRO
24	Official Court Reporter

DAVID G. TRAGER, Esq.
United States Attorney for the
Eastern District of New York

By: JEFFREY KAY, Esq.
Assistant U.S. Attorney

IVAN PISHER, Esq. Attorney for Defendant MR. FISHER: Ivan Fisher.

Mr. Ulman is my associate.

MR. KAY: Jeffrey Kay.

MR. FISHER: We're here with regard to
United States versus Henry Gomez Londono, scheduled
to commence trial August 2, 1976.

As a result of some fruitful discussion just concluded between the Government and us, and pending one small, assuredly non-troublesome matter--

THE COURT: Like consulting your client?

MR. FISHER: No, I consulted my client.

We intend to stipulate to all the facts
necessary for the Court's consideration of a motion
to suppress to be filed with the permission of the
Court within two weeks of tomorrow -- Monday -- to
go with motions to dismiss all three counts in the
indictment.

The defendant will stipulate on the record to those facts Monday morning, and in the event that the Court does not agree with us, we agree to enter a plea of guilty to one -- I guess the 1001.

MR. KAY: 922(e)

THE COURT: The ten-year count?

MR. FISHER: The five-year count. We understand the Government would have a right to appeal

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from your ruling.

Obviously we would as well.

MR. KAY: That's correct.

THE COURT: Let's see how it would work out.

Since it will be a determination on a motion to

suppress--

MR. FISHER: In part, but not entirely.

THE COURT: That would at least be appealable, if it went against you. How about the rest of it?

MR. FISHER: There will be independent argument.

THE COURT: Sufficiency, expanded sufficiency.

MR. PISHER: And the applicability of 1001.

THE COURT: In other words, it would be on the theory, suppose the indictment alleged all these facts that have been stipulated, then would it be a sufficient indictment.

MR. FISHER: With regards to 1 and 2, we would submit, respectfully, the answer is No. With regard to Count 3, our defense depends upon your conclusions to our motion to suppress.

THE COURT: Which was the one that we were concerned about transportation?

LAW CLERK: Count 2.

MR. FISHER: Our position is that could not

20 have been violated until Mr. Londono got to the airplane-

THE COURT: Or got beyond the 12-mile or 200-mile limit?

MR. FISHER: Something like that.

THE COURT: Would it have to be a foreign carrier?

MR. FISHER: No.

THE COURT: American flag airplane?

MR. FISHER: It matters not, I think, your Honor.

THE COURT: Citizen?

MR. FISHER: That, too, matters not. The regulation promulgated pursuant to that provided that a written--

THE COURT: Let me ask you, are you all agreed on this procedure? We ought to tell the jury right away.

MR. FISHER: We agree on the procedure. We're in sharp disagreement as to the result.

THE COURT: Oh, of course.

Ought we to release the jury?

MR. PISHER: Yes.

THE COURT: All right.

MR. FISHER: To continue our point as roughly

as possible, the regulations which were promulgated pursuant to 1101 of Title 21, the relevant statute makes it clear that a written form must be filled out and that it may be filled out at any time prior to the actual departure of the defendant.

Now, Londono--as the stipulated facts will make clear-was arrested well prior to-- He never departed. In fact, he was arrested in the departure lounge. He was advised of the requirement of the law according to the stipulation.

THE COURT: Is that after he had checked in?

MR. KAY: His bags were on the aircraft. He had checked in, had cleared security, and he was in the immediate--

THE COURT: He cleared security with a push and a shove from his government.

MR. KAY: No, he was there on his own.

THE COURT: How did he get through security?

MR. FISHER: The weapons were in the baggage.

He didn't have them on him.

THE COURT: I have asked them repeatedly and they say, "No, we don't care whether they are locked or not." It seems so odd to me.

MR. FISHER: Yep.

With regard to 1001, we think that's

inapplicable in the instant case. We think when an investigation gets to a custodial state such as this, 1001 is inappropriate. We think in addition there is no actual violation of 1001 under any construction and that, too, will be threshed out in our motion. We will file those--

THE COURT: That's a little bit remeniscent of Judge Learned Hand's suggestion of several years back.

MR. FISHER: The Supreme Court in Gardner rejected with great respect Justice Learned Hand's remarks.

THE COURT: Fortunately.

MR. FISHER: Our argument has more merit than that. That is roughly -- I left the most important thing out, the motion to suppress. The agent came upon Londono and they had information contained in a teletype coming from an informant in Bogota, Colombia, who claimed that Mr. Londono was going to leave the country with \$100,000 in cash to consummate a narcotics transaction in Colombia--

MR. KAY: Returning from, in the process of completing a narcotics transaction.

MR. FISHER: Whatever the stipulation.

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There is no dispute about that.

In any event, when they came upon Londono it was hardly in the course of a regular type customs investigation; it was a target type situation, and they knew who they were looking for, why, what to look for.

We feel that that time-- We also feel in this one area that we haven't worked fully out in the stipulation -- Mr. Kay is going to inquire of the witnesses as to the corporeal arrangement of the various investigators who were agents at the time questions were put to Mr. Londono, to which we will argue there was a custody interrogation and Miranda should apply and was violated.

The Government will plead that Miranda rights were not given until well after.

THE COURT: He was certainly in focus.

MR. KAY: No question about that the agents were looking for Mr. Londono. We disagree on the issues at the time the possession of the money is no crime. Had he gone into the airport and filled out the form and gotten on that airplane no crime was committed.

The Government and the agents who were there could not have prevented it as long as he filled

out the form. Once he was stopped and questioned and explained the statute and there are other circumstances that happened at that point in time where \$10,000 was in an envelope which he handed to the agents, based upon the informant's information, the time of departure classic Draper situation, description, passport number, the time that he is departing, he shows up, he meets the description, they stop him, ask him the questions, advise him of the statute, the opportunity to declare. He denies everything. The envelope is handed over.

They ask if he got more than \$5,000. "Someone gave me the envelope, I don't know what's in it."

It is opened by customs agents. \$10,000 in United States currency--

THE COURT: You would say it's a combination of Terry v. Ohio, and something else.

MR. KAY: We feel 1101 of the Krinsey statute is applicable to the situation and he did have nice -- that's the requirement to file a form -- and the violation didn't exist until he failed to file it and was put on notice and he made the false statement regarding that he wasn't carrying more than \$5,000.

To get him let on the plane and leave the

10 1 country, he is never coming back. We felt at that 2 point in time ten minutes before departure, how 3 much longer are we going to let him go before we 4 stop him. 5 THE COURT: I think that excuses you from 6 getting a warrant but not from having probable 7 cause. 8 MR. FISHER: I think the informant's 9 information is enough for the probable cause. 10 THE COURT: They had a right to interrogate. 11 MR. KAY: I don't think at that point in 12 time it was an interrogation --13 THE COURT: The reason why in a stop-and-14 frisk type situation you have enough in your hands, 15 if you don't at least ask the question you're 16 derelect. Then you ask the question and the answer 17 is one that affirms your suspicion into probable 18 cause. Is that what you're suggesting? 19 MR. KAY: Right. If Mr. Londono told the 20 agents, "I'm carrying \$100,000. Let me have the form," 21 and he fills out the form, no violation. We had 22 let him get to the airplane. 23 THE COURT: When we were discussing it, 24 Connor and I, no one ever asked me how much I was 25 taking out of the country, and Connor --

MR. CLAYMAN: They assumed a federal judge wouldn't have \$5,000.

MR. ULMAN: I had a conversation with a woman in the Customs Service this morning and I was curious as to what the Customs Service practice is, and she informs me, and I don't recall the name, the practice is to do nothing, that the person himself is supposed -- Customs doesn't talk to you when you're leaving the country, only when you're coming in. Most people aren't spoken to by Customs.

MR. KAY: At the time at the Pan American Building, the Government will stipulate there were no signs up. No question. The question is under the circumstances that the agents did advise him of it, what the statute required, and gave him the opportunity and asked him.

Now, it's curious on the incoming customs

declaration which Mr. Londono filled out, it asked

the same question incoming, because the same

situation goes as coming in, but now they have

got the place plastered with English and Spanish

for outgoing passengers.

MR. FISHER: That is to Mr. Londono. We sent an associate to the airport the following day and

A 27

we took pictures and there were no signs.

Incidentally, airport personnel didn't know of the requirement.

THE COURT: Is that one of those statutes that would come within the no knowledge necessary, or that you have to know about the law to violate it, or what?

MR. FISHER: I would think so. This is certainly not Molen per se; this is Molen prohibitive. As to that I think fairness requires some noise. Nobody knows. So few people knew at the time of this requirement, as your Honor said, you didn't.

THE COURT: I didn't say that. We were never asked.

MR. KAY: If you went to the customs counter they'd give you the counter. I spoke to a customs inspector. I went over to him. "What's the law?"

People come up and ask questions, how much money they're allowed to take out and we give them the form.

I asked him the procedure. "Do you count it?"

"No, as long as you fill out the form."

People in the banking industry know all about it and do-

MR. CLAYMAN: There is no question that

Henry Londono may be one of the faw people in the

world that was told that the statute existed, "And

now you know, do you have any money?" and he denied

it. There is no question that he was informed what

the law is.

MR. FISHER: But he was not given an opportunity to comply with it.

THE COURT: The next point was he was then free to say, "How interesting. Please supply me with the means of complying."

MR. KAY: Unfortunately, he said, "I don't have any money," three times, which would have made him difficult to comply with the law.

THE COURT: He already had the \$10,000.

MR. FISHER: That was in an envelope.

THE COURT: He knew about -- arguably.

MR. FISHER: I would say--

MR. CLAYMAN: He knew the money was secreted in the stereo's.

MR. FISHER: We will stipulate to knowledge of all his luggage. They didn't have the right to question him without giving him his Miranda

A 29 14 reads-

rights. They were after a case.

MR. KAY: The way the case law reads--

THE COURT: I'm so glad you are doing it by stipulation so we can save all these lovely points.

MR. FISHER: That's right. They are interesting— they really are. Jeff Ulman suggested supposing someone came to me and arrested me on April 14 for failing to file my tax returns in a timely way the day before.

MR. KAY: I don't think it's akin.

MR. CLAYMAN: We suggested if they came to Mr. Fisher and they asked, "Do you have any income?" and he said no--

MR. FISHER: That might be a violation of 1001, but not a violation of waiver -- the filing statute. That's the point.

THE COURT: I'm not going to decide it until
I hear argument.

MR. FISHER: We're happy to hear that actually.

I'm not sure the parties feel we have properly

crystalized the argument. We have agreed to the

following schedule: Our papers will be in on or

before the 16th of August; the Government's to be

filed within two weeks thereafter, and in any event--

THE COURT: Wait a minute. August 16-Better make it the 17th. The Government's the
31st.

MR. FISHER: Correct. We'll appear with the defendant Londono Monday morning and put all of this in the record in his presence.

THE COURT: We wouldn't need a waiver of a jury trial.

MR. FISHER: Not at that point.

THE COURT: But he should sign the stipulation of facts.

MR. FISHER: Yes.

THE COURT: Thanks, gentlemen.

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2	UNITED STATES DISTRICT COURT
3	EASTERN DISTRICT OF NEW YORK.
4	x
5	UNITED STATES OF AMERICA, :
6	-against- : 76-CR-153
7	HENRY GOMEZ LONDONO,
8	Defendant. :
9	x
10	
11	
12	United States Courthouse Brooklyn, New York
13	August 2, 1976 10:00 o'clock A.M.
14	10.00 0 0200
15	
16	
17	Defore:
18	HOHORABLE JOHN F. DOOLING, JR., U.S.D.J.
19	
20	
21	
25	1 4 7 7 8 8
2	correspondent corresponds the form my sten-
2	ACTING true land good this proceeding.
2	
	Official Court Reporter

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: JEFFREY KAY, ESQ.
Assistant U.S. Attorney

IVAN S. FISHER, ESQ. Attorney for Defendant

Also present:

ALBEN BARRON-BOYNE Interpreter

sworn by

(Whereupon the interpreter was sworn by the Clerk of the Court.)

MR. FISHER: If your Honor please, counsel in in this case had the opportunity of appearing before your Honor in Chambers Priday afternoon where we discussed certain agreements reached between us.

The purpose of these proceedings is to allow these objections to appear on the record in open court in the presence of the defendant.

As a result of his arrest on February 22, 1976
the defendant has been charged with in his three
count indictment, violation of 1001 United States Code
Title 18 -- Title 31, Section 11018, and the third
count relates to his alleged possession of loaded
weapons in his baggage. The defendant, through me,
is prepared to stipulate to the facts which the
parties deem relevant for certain legal issues to be
presented to your Honor in the form of written motions
and memoranda of law.

The substance of the stipulation is contained in a document which I believe the Government is in the possession, to file with this Court as Court exhibit at this time.

I have reviewed the contents of that stipulation

together with the verment's contained in an affidavit contained in a search warrant obtained on or about the time of the defendant's arrest, are in fact stipulated to as the operation facts. These will be the motions to be filed.

In reliance upon these stipulations the defendant within two weeks from tomorrow will file motions to suppress statements contained as a result of what we regard lawful interrogation.

THE COURT: That will be motions and supporting memorandum?

MR. FISHER: Yes, your Honor. In addition a motion attacking the search warrant issued in this case together with motions, the thrust of which are that counts one and two are on the basis of the stipulated facts unproven as a matter of law. I understand within two weeks after the filing of our papers the Government will respond to our papers.

If the Court wishes to hear all the arguments we will be available to your Honor for your Honor's convenience in that.

As a result of that we are waiving a jury trial and will ask the Court to rule on these various motions as pre-trial motions. We'll ask the Court

1 to regard the stipulation as the trial record, and 2 as I say, waive a jury .. 3 4 5 6 7 9 MR. FISHER: In the event that your Honor 10 11 12 13 14 counts that has yet to be determined. 15 MR. KAY: Which will be the defense's right 16 17 18 19 defendant's favor. 20 21 22 23 24 25

MR. KAY: Your Honor, just to correct the

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record stipulation on the facts has not been fully typed yet. Mr. Boyne is going over it right now with the defendant to make sure that everything that is in there is accurate. As soon as it's typed it will be signed by Government, the defendant and Mr. Fisher.

desides against us and it's the understanding of both parties that this case will then be one way or the other, brought to the Court of Appeals. We intend to interpose a plea as to which count or

to appeal if the motion to suppress is found in Government favor and the Government has the right to appeal if the motion to suppress is found in the

THE COURT: I take it the point is that we then must so arrange matters that to both appellate rights are preserved. So, that if for some reason or other some entertaining decision is concluded that I have a plea of guilty to any count irrevocably

36 waives everything else, we'll have to devise some 2 other matter; is that right? 3 MR. FISHER: Yes, your Honor. MR. KAY: Yes, your Honor. 5 THE COURT: All right, I take it you have not 6 yet gone over with Mr. Londono the drafted stipulation. 7 MR. FISHER: I have done that your Honor 8 prior to appearing before your Honor Friday. As a 9 matter of fact, there are some minor modifications 10 of the stipulation suggested today by the Government 11 and we would terminate the proceeding before your 12 Honor, wait the final draft from the Government and 13 sign it, and submit it to the Court without necessity 14 I believe of further appearances before your Honor 15 today. 16 THE COURT: If there is any problem I take it 17 Mr. Gomez Londono would not be returned to MCC until 18 it's --19 MR. FISHER: Your Honor, the defendant has 20 been on bail, has been since February. 21 THE COURT: I forgot that. Is that all right 22 ith you Mr. Londono? 23 THE WITNESS: Yes your Honor. (Whereupon at this time the hearing was ornaluded.) 25

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK 37

UNITED STATES OF AMERICA,

-against-

76 CR 153 WAIVER of JURY TRIAL

HENRY GOMEZ LONDONO.

Defendant

:

It is stipulated between the United States and defendant and by their attorneys that the defendant, being fully advised that he has a constitutional right to a trial by jury, hereby waives his right to trial by jury and consents to the disposition of the case on the written stipulation of facts today read into the record by the Court sitting without a jury both as to the suppression issues and on the merits of the charge of the indictment, and that the United States joins in the waiver of jury trial and also consents to a non-jury disposition of all the issues in the case on the basis of the stipulated facts.

Brooklyn, New York September 1, 1976

Ivan S. Fisher

Attorney for defendant

Approximate, September 1, 1976

United States of America

By David G. Trager

Assistant U. S. Attorney

Comes londone Henry Gomez Londono

A 38 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK UNITED STATES OF AMERICA : -against- : 76 CR 153 HENRY GOMEZ LONDONO, : Defendant : United States Courthouse Brooklyn, New York September 1, 1976 Before: HONORABLE JOHN F. DOOLING, JR., U.S.D.J. RAYMOND P. STALKER ACTING COURT REPORTER

Appearances:

DAVID C. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: CHARLES CLAYMAN, ESQ. Assistant U.S. Attorney

JEFFREY ULLMAN, ESQ. Attorney for Defendant

A 40 THE CLERK: I say it is America against Henry Gomez Londono.

(Whereupon, Ms. Dena Cohn was sworn to act as the Official Spanish Interpreter.)

MR. ULLMAN: Your Honor, I am here for Mr. Fisher today. My name is Jeffrey Ullman. I am one of his associates.

We have reached an agreement on the stipulations of fact, both for the purposes of this motion and especially for the purposes of trial, if it should become necessary and this is the full and complete agreement of the parties.

I represent these are all the facts
which would be adduced if the hearing would be
held and the parties have agreed to be bound
within the four corners of the stipulation.
I submit, in addition, I suppose almost as an
afterthought that the affidavit submitted in
port of the search warrant, which was issued in
this case, will also be included in the file.
That fact is included also.

THE COURT: No objection?

MR. CLAYMAN: Certainly no objection to that.

s make

THE COURT: Do we have the file? Let's make sure we are all talking about the same affidavit. It is the affidavit of Robert Annuziato.

MR. CLAYMAN: That is the complaint. There should be another affidavit for the warrants. It is possible that it was kept --

MR. CLAYMAN: It is possible that the warrant was carried under another miscellaneous file. What I will do is check. I will check the file for the warrant and have that sent to your Honor. In the meanwhile, we can make the stipulations -- you should have the affidavit which was filed -- I don't think it would be the next one because it was another later day.

THE COURT: It should be a closed file?
MR. CLAYMAN: Right.

THE COURT: That is a complaint by right, no question about it.

MR. CLAYMAN: As I understand it, the purposes of these proceedings this morning is to read into the record the stipulations which we have ultimately agreed upon and to have Mr. Henry Gomez Londono, who is present at this time, agree and waive any trial and to agree to the stipulation and I believe an interpreter is present.

42 COURT: Does have to do that in writing? Be-1 cause he is sort of waiving a jury trial? 2 MR. ULLMAN: That is correct. 3 COURT: So you better put that in writing, 4 because there is a law about that. 5 MR. ULLMAN: If I can make a suggestion, your Honor, 6 I propose to read the stipulation into the 7 record and it will be simultaneously translated 8 by Ms. Cohn. 9 THE COURT: Has she got a copy before 10 her? 11 MR. ULLMAN: I only have one. I think 12 I can read Mr. Clayman, because mine is the 13 conformed one. If I may be permitted to do 14 that. Then I expect since we have discussed 15 this with him he will agree on the record to 16 the stipulation and what formal written docu-17 ments that have been filed in order to save 18 time and await the next appearance of this 19 matter. 20 THE COURT: We will proceed. 21 MR. ULLMAN: The stipulation reads as 22 follows: 23 "It is hereby stipulated and agreed to 24 by and between the defendant, Henry Gomez 25

Londono, by his attorney Ivan S. Fisher, and 1 David G. Trager, the U.S. Attorney for the 2 Eastern District of New York by Jeffrey H. Kay, 3 and Charles Clayman, Assistant U.S. Attorneys 4 the district stipulation of facts is to be used 5 during the motion to suppress under Rule 41, 6 F.R. criminal P; and for trial purposes. 7 "One, that on February 21, 1976, U.S. 8 custom agents received information from The 9 E.P.A. agents that a reliable E.P.A. informant 10 had advised that an individual known as Henry 11 Gomez Londono would depart the New York area 12 for Columbia, South America during the period 13 February 21, 1976 through February 25, 1976, 14 taking with him \$100,000. in U.S. currency to 15 complete a narcotics transaction. 16 "Two, the informant had provided in 17 December of 1975 the following physical descrip-18 tion of Henry Gomez Londono; date of birth --19 October 12, 1957; brown hair; brown eyes; 20 thick lips, broad nose; square hairline: 21 Columbian passport number 535124. 22 "On February 21, 1976, U.S. custom's 23 agents established a surveillance at the Pan American World Air Lines terminal at 25

John F. Kennedy International Airport, Queens, New York, at the Avianca Air Lines' departure 2 area. 3 "Four, on February 22, 1976, U.S. 4 custom's agents established a surveillance at 5 the Pan American World Air Lines: Terminal at 6 John F. Kennedy International Airport at the 7 Avianca Air Lines' departure area. 8 "Five, on February 22, 1976, U.S. 9 custom's agents were advised by an air line 10 employee that an individual named Henry Gomez 11 Londono, was presently in the Avianco Air Lines 12 area. 13 "Six, U.S. custom's agents observed 14 Londono and determined this individual matched 15 the description previously furnished by the 16 informant. 17 "Six - A, Londono was stopped as he 18 walked toward the Avianca Air Lines' departure 19 area by non-uniformed custom's agents. 20 "Seven, uniformed custom's Inspector 21 Robert Como was brought over and identified 22 himself to Londono as well as custom's agents 23 Healey and Annunziato, since Healey and 24 Annunziato were in plainclothes. A Pan Ameri-25

can employee acted as a Spanish interpreter. 1 "Seven - A, that in addition to the 2 above mentioned individuals the following 3 persons were present in the immediate vicinity 4 when Mr. Londono was questioned: 5 One Pan Am employee and two port authori-6 ty police officers. None of these individuals 7 participated in the questioning or the arrest 8 of Mr. Londono. The police officers were 9 regularly assigned to the Pan American terminal 10 to observe departing passengers. 11 "Eight, that Londono was advised of the 12 provisions of Title 31, Section 1101 (b); two, 13 that he was required to make a report declaring any money he was taking out of the country in 15 excess of \$5,000. He was then asked if he was 16 taking out more than \$5,000. in currency. 17 Londono denied to custom agents to hav-18 ing more than \$5,000. in currency. 19 "Nine, after being asked a second time 20 whether he had more than \$5,000., Londono told 21 the custom's personnel he had \$900. in currency 22 and showed the custom's people the cash he had 23 in his pockets. 24 "Ten, Londono voluntarily handed to the 25

custom agents an envelop from his jacket pocket and told the custom people he did not know what 1 was inside the envelop, after being asked a 2 third time if he had more than \$5,000. 3 "Eleven, custom's agents observed some-4 thing green through an opening in the bulged 5 envelop and opened the envelop and determined 6 it contained \$10,000. in U.S. currency of \$100. 7 denominations and a photograph of Londono. 8 "Twelve, Londono told the custom's 9 personnel some people asked him to deliver an 10 envelop to Bogotia, Columbia. 11 "Thirteen, Londono was told by U.S. 12 custom's agents that he was in custody. Air 13 line ticket, passport and baggage claim tickets 14 were then taken from Londono. 15 "Fourteen, luggage and cartons checked 16 on board Avianca aircraft were removed by 17 custom's agents and taken to U.S. office at the 18 International Arrival Building along with 19 20 "Fifteen, Londono was then first advised Londono. 21 of his constitutional rights at the Interna-22 tional Arrival Building in Spanish and inter-23 24 viewed. 25

"Sixteen, Londono was then taken to U.S. custom's office in New York City for finger-2 printing and processing enlarged at MCC that 3 night. Luggage and cartons were secured in the 4 security area of U.S. custom's. 5 "Seventeen, on February 23, 1976, 6 Londono arraigned before U.S. Magistrate. 7 "Eighteen, that the following items are 8 the property of the defendant, Henry Gomez 9 Londono and were found on his person or in his 10 possession at the time of his arrest on 11 February 22, 1976. 12 "Exhibit 1, brown documents case. 13 "Two, Columbian passport number M-434962] 14 "Three, passenger ticket number 8109; 15 808; 516. 16 17 "Four, coupon one - ticket 8109; 808; 516. 18 "Five, Avianca excess baggage ticket 19 60345. 20 "Six, baggage tickets 14-13-69, 21 14-k3-83, 14-13-85, 22 "Seven, international driver's license 23 343926. 24 "Eight, international vaccination certi-25

48 ficate, Henry Gomez Londono. 1 "Nine, Columbia-Cedular card number 2 70.070.457 Henry Gomez Londono. 3 "Ten, Regis Camera Incorporated billed-4 one television. 5 "Eleven. Regis Camera Incorporated 6 billed -- Sony stereo set. 7 "Twelve, Regis Camera Incorporated, and 8 business card. 9 "Thirteen, white envelop. 10 "Thirteen - A, \$10,000. U.S. currency -11 \$100. denominations. 12 "Thirteen - B, small yellow envelop with 13 photographs. 14 "Fourteen, Sears Roebuck invoice number 15 1882840. 16 "Fifteen, Sears Roebuck invoice number 17 1882838. 18 "Sixteen, black wallet. 19 "Seventeen, Columbia military card num-20 ber 3-198234 Henry Gomez Londono. 21 "Eighteen, \$870. U.S. currency. Pana-22 sonic television set. 23 "Nineteen, that the following items were 24 found pursuant to search warrant in the three 25

suitcases and Sony HP - 319 carton checked-in by the defendant, Henry Gomez Londono to Avianca Air Lines on February 22, 1976 at John F. Kennedy International Airport. These items were on board the Avianca aircraft in the belly of the aircraft, when the luggage and cartons were removed by custom agents following the arrest of Londono and are the property of the defendant, Henry Gomez Londono;

The exhibits are as follows:

"Nineteen, suitcase (identified as number one).

"Nineteen - A, Evil Knievel lunchbox.

"Nineteen - B, Evil Knievel thermos.

"Nineteen - C, \$930. U.S. currency in thermos.

"Nineteen - D, Snow White lunchbox.

"Nineteen - E, Snow White thermos.

"Nineteen - F, \$1,070. U.S. currency in thermos.

"Twenty, suitcase (identified as number two).

"Twenty - A, orange chair cushion.

"Twenty - B, \$30,050. U.S. currency in cushion.

"Twenty-one, suitcase (identified as 50 A number three). 2 "Twenty-one-A, 26 miscellaneous photo-3 graphs. 4 "Twenty-one-B, six watches. 5 "Twenty-three, Sears' vacuum cleaner 6 coffin. 7 "Twenty-four, Marx Electro shot carton. 8 "Twenty-five, baggage tags 14-13-93, 9 14-13-83. 10 "Twenty-six, Sony stereo music system 11 HP - 319 carton. 12 "Twenty-six-A, speaker (identified as 13 number one). 14 "Twenty-six-B, \$12,730. in U.S. currency 15 from speaker number one. 16 "Twenty-six-C, Columbian passport 17 P-535126 Luis Octavio Ramirez Caro. 18 "Twenty-seven, speaker (identified as 19 number two). 20 "Twenty-seven-A, radio-cassette in 21 speaker number two. 22 "Twenty-eight, Sony stereo music system 23 receiver-phonograph. 24 "Twenty-eight-A, handkerchief bearing 25

initial H. found in phonograph receiver. 1 "Twenty-eight-B, handkerchief bearing 2 intial H. found in phonograph receiver. 3 "Twenty-eight-C, piece of brown cloth. 4 "Twenty-eight-D, loaded 38 caliber 5 Smith and Wesson found in phonograph receiver. 6 "Twenty-eight-E, loaded 38 caliber colt 7 revolver found in phonograph receiver. 8 "Twenty, that the following government 9 exhibits' would be used and introduced into 10 evidence at a trial: 11 "Twenty-nine, custom's declaration of 12 Henry Gomez Londono dated December 13, 1975. 13 "Thirty, U.S. immigration form I-94 of 14 Henry Gomez Londono, dated December 13, 1975. 15 "Thirty-one through thirty-one P, color 16 photographs of suitcase containing clothes, 17 lunchboxes and their contents. 18 "Thirty-two, through thirty-two E, color 19 photographs of suitcase containing clothes, 20 watches, photographs. 21 "Thirty-four, through thirty-four Q, 22 color photographs of Sony carton speakers con-23 tents, receiver-phonograph and contents. 24 That concludes the stipulation." 25

THE COURT: Now, do we need to add 52 A to that stipulation that the affidavit of 1 Robert Annunziato, sworm to February 24, 1976, 2 is also before the Court as the basis for the 3 4 warrant? MR. ULLMAN: That is correct. 5 MR. CLAYMAN: And so agreed to by the 6 government there, your Honor. 7 MR. ULLMAN: I don't think it is neces-8 sary to read that. So, we can save time since 9 that would have come out at a hearing, it would 10 have been read into the record anyway. 11 THE COURT: If on its face it is 12 insufficient we have a situation --13 MR. CLAYMAN: We have a situation zero. 14 COURT: Now, I have written-up and I think I am 15 getting typed the stipulation on the jury 16 issue if it meets with your approval. Do you 17 18 have a copy of that? MR. ULLMAN: It is easier reading, 19 although it gets more stimulating at the end. 20 THE COURT: , Do you have another copy? 21 MR. ULLMAN: I don't have another con-22 THE COURT: You can submit it and we 23 formed copy. 24 25

can have the minutes typed up. It would be much better if we can do that.

(Short pause)

MR. CLAYMAN: It is acceptable to the Government.

MR. ULLMAN: It is acceptable to the defendant.

THE COURT: Will you sign it?

(Whereupon, Mr. Clayman signed document)
(Short pause)

MR. ULLMAN: Let the record reflect the stipulation regarding a waiver of a jury trial is being read to Mr. Londono by Ms. Cohn, previously sworn as an interpreter.

(Short pause)

(Defendant signing document. Mr. Ullman signing document).

MR. CLAYMAN: Your Honor, I have been informed by Mr. Ullman, that they intend to have their memorandum of law and moving papers sent to us this afternoon or tomorrow morning. The Government would then ask for approximately two weeks and we would answer the multitude of questions and issues which have been raised.

MR. ULLMAN: Legally anticipating the

Government's papers, I would ask on our behalf 54 a reasonable time to respond? 1 THE COURT: One further week. 2 MR. ULLMAN: I think that would be 3 4 sufficient. MR. CLAYMAN: If you get in trouble let 5 6 me know. MR. ULLMAN: My understanding is or my 7 recollection is at this moment, it is not 8 entirely clear. I thought we had motions or 9 will the memorandum of law suffice? 10 THE COURT: They are in. 11 12 MR. ULLMAN: Good. MR. CLAYMAN: They will be in. 13 THE COURT: I can't find the file. 14 MR. CLAYMAN: If they haven't been filed 15 16 within ten days --THE COURT: We have the indictment and 17 18 notice of readiness. MR. CLAYMAN: Since the papers have not 19 been filed within the required ten days of the 20 indictment, maybe the Government should move --21 THE COURT: I don't think in good con-22 science I could go along with that. He has 23 just written Henry Gomez in his handwriting. 24 25

A Should he had Londono? MR. CLAYMAN: Londono I believe is the mother's name. MR. ULLMAN: I think, your Honor --THE COURT: I think Londono is the mother's maiden name then. ó It is fully signed now, Fred. MR. CLAYMAN: Very well. THE COURT: I think that finishes our business except for bail. Bail is continued. MR. ULLHAN: Thank you, your Honor. (Whereupon, these proceedings were con-cluded.)

UNITED	STATES	DISTRI	CT	COURT
EASTERN	DISTRI	CT OF	NEW	YORK

UNITED STATES OF AMERICA

- against -

HENRY GOMEZ LONDONO,

Defendant.

76 CR 153 NOTICE OF MOTION

SIR:

please Take Notice, that upon the annexed Affidavit of Ivan S. Fisher, Henry Gomez Londono, the defendant above named, will move this Honorable Court, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on Monday, August 2, 1976, at 10 o' clock in the forenoon, or as soon thereafter as counsel may be heard, for an order:

- 1. Supressing any and all statements made by Henry Gomez Londono to any law enforcement officer on February 22, 1976, on the ground that the statements elicited from Henry Gomez Londono on that day by agents of the United States Customs Service and/or other persons acting as agents of the United States government were obtained in violation of the fifth and sixth amendment rights of Henry Gomez Londono and in violation of the strictures announced in Miranda v. Arizona, 384 U.S 436(1966);
- 2. Suppressing any and all statements made by Henry Gomez Londono to any law enforcement officers and/or other agents of the United States Government on February 22, 1976, upon the further ground that the statements were elicited at a time when Henry Gomez Londono had been unlawfully arrested and detained by agents of the United States government;
 - 3. Suppressing any and all physical evidence siezed

from the person, luggage, and/or personal effects of Henry Gomez Londono on the ground that the search of Londono and his luggage and personal effects was illegal and the tainted product of the deprivation of Mr. Londono's fourth, fifth and sixth amendment rights; and

4. For such other and further relief as to the Court may seem just and proper.

Yours etc.

Ivan S. Fisher
Attorney for the Defendant
410 Park Avenue
New York, N.Y. 10022
(212) 355-2380

TO: David G. Trager, United States Attorney
Jeffrey H. Kay, Assistant United States Attorney
United States Courthouse, Eastern District of New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- against - :

AFFIDAVIT

HENRY GOMEZ LONDONO,

Defendant.

STATE OF NEW YORK)

COUNTY OF NEW YORK)

IVAN S. FISHER, being duly sworn deposes and says:

I am the attorney for Henry Gomez Londono, the defendant above named, and I made this Affidavit in support of the motion to suppress made in the accompanying notice of motion.

In an effort to obviate the necessity of a hearing on the motion to suppress, counsel for both sides of this litigation have endeavored to reach agreement with respect to what facts would be adduced at a hearing on a motion to suppress if such a hearing were held. Counsel for the government has prepared a stipulation setting forth those facts which the government expects to prove in support of its position opposing the motion to suppress. I believe that with minor modification this stipulation will be satisfactory to the defendant as a substitute for the record on a hearing. Following an agreement with the government which I expect to reach today respecting those facts which the record would reflect were a hearing to be held on a motion to suppress, and with the consent of the Court to this procedure, I shall be prepared to brief the issues raised herein,

and submit a memorandum of law to the Court at such time as the Court may direct.

Simply put, the defendant contends that he was unlawfully detained and interrogated at John F. Kennedy Airport on February 22, 1976, without being apprised of his rights under the fifth and sixth amendments to the United States Constitution. The search warrant which issued subsequent to this illegal arrest and interrogation, the defendant further contends, was the tainted fruit of that unlawful activity by the government. Both the statements elicited during the interrogation of the defendant and the evidence obtained pursuant to execution of the search warrant, therefore, must be suppressed.

WHEREFORE, your deponent prays that the relief sought herein be granted.

Ivan S. Fisher

Dated: New York, New York July 30, 1976

Sworn to before me this 30th day of July, 1976.

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

76 Cr. 153

-against-

HENRY GOMEZ LONDONO, Defendant

MEMORANDUM OF LAW

I INTRODUCTION

On February 22, 1976, as he neared the departure area of Avianca Airlines at John F. Kennedy International Airport, Henry Gomez Londono was accosted by three United States customs agents, two of whom were in uniform, and directed to stop. Londono, surrounded shortly thereafter by the three agents plus two uniformed Port Authority Patrolmen and an employee of Pan American World Airways who acted as a Spanish interpreter was advised by the customs agents of the provisions of 31 U.S.C. §1101, and questioned about whether or not he was taking more than five thousand dollars out of the United States. Neither advised of his rights under Miranda, nor informed that it was not illegal to take more than five thousand dollars out of the United States, nor provided with the appropriate form on which to declare the amount of money in excess of five thousand dollars which he intended to

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transport out of the United States, Londono gave a series of answers which were used both to obtain a search warrant for his luggage and as the predicate for the first and second counts of this indictment.

Londono's statements, his subsequent arrest, and the rearch of his baggage, are the subject of this motion to suppress.

POINT 1

THE STATEMENTS MADE BY THE DEFENDANT IN RESPONSE TO QUESTIONS BY CUSTOMS OFFICIALS MUST BE SUPPRESSED.

A. THE FAILURE TO ADVISE THE DEFENDANT OF HIS RIGHTS PURSUANT TO MIRANDA v. ARIZONA, 384 U.S.436 (1966) REQUIRES SUPPRESSION.

That Londono was "in custody" at the time customs agents interrogated him on the subject of the amount of money he intended to transport out of the country cannot be seriously disputed. Londono, who speaks no English, was walking toward the Avianca Airlines departure area. He was accosted, stopped and ultimately surrounded by half a dozen individuals, including five law enforcement agents, three of whom were in uniform. Two armed uniformed Port Authority police officers

were present, apparently for the sole purpose of inducing Londono's submission to a show of authority. Londono was interrogated through a Spanish interpreter, and when his answers failed to satisfy customs agents he was asked the same questions again and again. Surrounded by uniformed and non-uniformed law enforcement officers who believed that Londono was about to transport a huge sum of currency out of the country for the purpose of consumating a narcotics transaction in Colombia; directed, under color of authority, to stop, and interrogated by customs agents who were present for the sole and express purpose of that interrogation, it could not have been clearer to Londono that he was not free at that point to resume his movement toward the departure area, or for that matter, to go anywhere else. Although Londono was not formally placed under arrest until after he had made the statements which formed the basis for count one of the indictment herein, this fact is of no particular moment. Londono was plainly in custody well before formal arrest occurred. As the Court pointed out in United States v. Gonzalez, 362 F.Supp. 415, 420 (S.D.N.Y. 1973):

> No formula need be uttered nor declaration made to the person arrested; it is sufficient that he be aware that he has been deprived of his full liberty.

See also, <u>Henry v. United States</u>, 361 U.S. 98, 103 (1959); United States v. Boston, 330 F.2d 937 (2d Cir. 1964).

Nor was this seizure of the person by custom agents undertaken for purely administrative, as opposed to criminal investigatory purposes. The agents had been advised by the Drug Enforcement Administration that it had obtained information from a reliable informant to the effect that Londono would leave the United States on or about February 21st with one hundred thousand dollars in his possession and that that money was to be used for the consumation of a narcotics transaction in Colombia. Accordingly, customs agents had gone to Kennedy Airport of February 22 -- and indeed, on the day before as well -- for the sole and express purpose of locating, identifying, and it may reasonably be inferred, interrogating Londono. Thus, Londono was the target of a pending criminal investigation. Law enforcement had focused upon him as a potential narcotics defendant, and/ or a potential violater of 31 U.S.C. §1101. He was in custody. Under these circumstances, as the focus of a criminal investigation and about to be asked questions designed to elicit incriminating responses, Londono was entitled to be advised of his rights under Miranda.

B. LONDONO'S STATEMENTS SHOULD BE SUPPRESSED EVEN ASSUMING THE COURT FINDS THAT LONDONO WAS NOT IN CUSTODY AT THE TIME OF HIS INTERROGATION.

the Court of Appeals affirmed a District Court order dismissing a perjury count of an indictment which had been brought as the result of the defendant's testimony before the Grand Jury. The defendant had been the target of an extortion investigation and had been subpoenaed to give testimony before the Grand Jury conducting the investigation. Although told that she had a Fifth Amendment right to refuse to answer questions which would tend to incriminate her and of her right to have counsel present outside the Grand Jury room, the defendant was not told that she was a target of the investigation. She was questioned about the contents of conversations which, unbeknownst to her, had been intercepted. In light of the prevailing practice in the

Southern and Eastern District of New York to inform such individuals that they are targets of investigation, the Court of Appeals declined to reach the constitutional claims presented by the defendant and upon which the District Court had based its opinion; instead, the Court affirmed the dismissal as a matter of supervisory power, finding that the failure to warn the defendant of her target status was, "if not in actual violation of the constitution, ... at least, outside the penumbra of fair play." United States v. Jacobs, supra, at 90. To the same effect, see People v. Canetta,

____Misc. 2d ___, ___N.Y. Supp. 2d ___, N.Y.L.J., August 13, 1976, at p. 6 col. 8 (Sup. Ct. 1976).

Similarly, in <u>United States v. Duvall</u> ___F2d ___, slip op. at 2123 (2d Cir. February 26, 1976), the Court expressed strong disapproval of another prosecutorial tactic designed to elicit incriminating information from uncounselled defendants: The post-arrest, but pre-arraignment"interview" with an Assistant United States Attorney. Ours is an accusatorial, not inquisitorial system of justice, and law enforcement practices designed to elicit incriminating information from persons on whom the law enforcement apparatus has already focused are properly viewed with a jaundiced judicial eye. See, generally, <u>United States v. Mandujano</u>, ___ U.S. ___, 48 L.Ed. 212 (1976).

^{*}It is important to note, first, that Jacobs, affirmed as a matter within the supervisory jurisdiction of the Court of Appeals, survives the constitutional holding in Mandujano; and, second, that the holding in Mandujano depended in large part upon the primacy of the role of the Grand Jury in our system of criminal justice; this point of cleavage does not diminish the force of Justice Brennan's prescient observations.

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Indeed, this position gathers substantial strength if the government is correct in its view that the statements made by Londono to customs agents were false statements within the reach of 18 U.S.C. §1001. See, esp., United States v. Chevoor, 526 F.2d 178 (1st Cir. 1976).

For Londono was faced with a situation in which his only viable alternative was silence. A truthful response would have had incriminatory implications in view of the government's belief that Londono was on his way to Colombia to engage in a narcotics transaction. At the very least, such a response could have provided links in the chain of evidence ultimately to be used against Londono. On the other hand, a false response, in the view of the government, was equally incriminatory because it represented a violation of 18 U.S.C. §1001. The only way for Londono to avoid being skewered on the horns of this dilemma was for him to remain silent. Under these circumstances, where any response would have been incriminatory, Londono clearly had a right to be told that he did not have to make any response at all.

It should be noted, in this connection, that Londono had a Fifth Amendment privilege to assert with respect to the questions asked of him by customs agents. He was under no affirmative obligation to respond. The statute, 31 U.S.C. \$1101(b), requires only that a report be filed if more than five thousand dollars is transported out of the United States

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on any one occasion. Thus, Londono could have chosen not to leave the country as an alternative to filing the report. Or, he could have departed with five thousand or less and arranged for the subsequent transmission of the remaining money in separate transactions of less than five thousand dollars each. See 31 C.F.R. §103.23. In addition, since the statute requires only that a report be filed at the time of departure, Londono could have filed the appropriate form but asserted his Fifth Amendment privilege with respect to all questions on the form. Compare Garner v. United States, U.S. , 47 L.Fd.2d 370 (1976). Thus, it is clear that Londono was entitled to assert his Fifth Amendment privilege with respect to the questions customs agents put to him. The failure to advise him of his right to do so under the circumstances presented here requires suppression of his answers.

The suppression of Londono's statements also requires, of course, the dismissal of count one of this indictment.

POINT 2

THE SEARCH WARRANT WHICH ISSUED AFTER LONDONO'S ARREST WAS IN-VALID AND ITS FRUITS MUST BE SUPPRESSED.

Following Londono's arrest, customs agents escorted him to the aircraft and there directed him to identify his luggage. After Londono identified the baggage and cartons he had checked on board the aircraft, the agents secured these items and then sought and obtained a warrant for their search. The affidavit submitted in support of the application for the search warrant purported to set forth probable cause to believe that Londono has committed a violation of 18 U.S.C. \$1001 and 31 U.S.C. \$1101(b). However, the facts set forth in the affidavit failed to establish probable cause to believe that Londono had made false statements cognizable within \$1001, or that he had transported more than five thousand dollars out of the United States without having filed a report, as required by 31 U.S.C. \$1101(b).

A. THE LACK OF PROBABLE CAUSE WITH RESPECT TO A VIOLATION OF 18 U.S.C. §1001.

At the outset it should be noted that if Londono is correct in his claims in Point I, infra, it follows, of course, that the averments contained in the affidavit submitted in support of the application for a search warrant which relate Londono's answers to the customs agent's questions were not properly before the magistrate, and thus, that there was no legal evidence before the magistrate justifying the conclusion that Londono had probably violated the provisions of §1001. But even assuming, arguendo, that the affidavit properly placed before the magistrate Londono's responses to

the questions asked of him by customs agents, those responses did not constitute "false statements" within the meaning of \$1001.

statements with regard to any matter within the jurisdiction of a department or agency of the United States. The affidavit of customs agent Robert Annunziato sets forth only two statements claimed to have been made by Londono at the time of his airport interrogation. Yet the first was literally true, and the second was not, based on the other allegations contained in the affidavit, probably false; to the extent that it was probably false, it was not material to the inquiry. Thus, the affidavit on its face failed to set forth probable cause to believe that Londono had made false statements, in violation of 18 U.S.C. §1001.

In response to the question "do you have more than five thousand dollars in United States currency?" Londono was alleged to have acknowledged that he had nine hundred dollars in his possession. This statement, of course, as the allegations in the affidavit make clear was literally true. At worst, it was non-responsive to the inquiry, but \$1001 does not proscribe the making of non-responsive answers. A literally true statement, however non-responsive to a question, is just not a false statement. See Bronston v. United States,

409 U.S. 352 (1973).

The only other statement alleged in the Annunziato affidavit to have been made by Londono occurred after Londono had voluntarily removed an envelope from his jacket pocket and handed it to the agents. According to the affidavit, Londono stated that he did not know what was in the envelope. However, nothing in the Annunziato affidavit suggests that this assertion was probably false. Even assuming, however, that the magistrate could, on the basis of the allegations contained in the affidavit, conclude that there was probable cause to believe that the statement was false, it was plainly not "material" to any "matter" within the "jurisdiction" of the customs service, or, for that matter, any other agency of the United States.*

^{*}The extent to which materiality is an element of a violation of §1001 has never been firmly resolved in this Circuit. The statute, by its own terms, proscribes the concealment by means of trick, scheme, or device, of material facts and the making of false fictitious and fraudulent statements and representations. The weight of authority is that the materiality requirement governs the false statement provision as well as the concealment clause. See, e.g., United States v. Stark, 131 F. Supp. 190 (D.Md. 1955); United States v. Krause, 507 F.2d 513 (5th Cir. 1975); United States v. Jones, 464 F.2d 1118 (8th Cir. 1972); Brethauer v. United States, 333 F.2d 302 (8th Cir. 1964); United States v. Ratner, 464 F.2d 101 (9th Cir. 1972); United States v. Allen, 193 F.Supp. 954 (S.D.Cal. 1961); United States v. Beer, 518 F.2d at 168 (5th Cir. 1975). These Courts have so construed the statute in order to prevent trivial false remarks from constituting serious felonies. However, although the Second Circuit has never directly passed on this issue, there is language in several cases to the effect that materiality is not an element of a claimed violation of the false statement clause of \$1001. See, United States v. Silver, 235 F.2d at 375 (2d Cir. 1956), United States v. McCue, 301 F.2d 452 (2d Cir, 1962). We assume here, for the sake of argument, that materiality is an element of a violation of the false statement clause; to the extent that Silver and McCue accurately reflect the posture which our Court of Appeals would assume today we rely upon the arguments set forth infra.

A false statement, in order to be material, must be such that it "has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made". United States v. Krause, supra, at 118. Here, the plain purpose of the interrogation of Londono was to determine whether he was about to remove more than five thousand dollars from the United States. Since he voluntarily removed the envelope from his pocket and showed it to the agents, his statements about his knowledge, or lack of knowledge, of the contents of the envelope could hardly have been capable of "influencing the decision" of the agents to pursue their inquiry to its natural conclusion. Londono's statement, therefore, was patently immaterial to the inquiry, and thus, not a false statement within the meaning of \$1001.

Thus, the only two statements alleged in the Annunziato affidavit to have been made by Londono turned out either to have been not false, or not material. Accordingly, the affidavit on its face fails to allege any fact which justified the conclusion that there was probable cause to believe that Londono had committed a violation of \$1001.

But even assuming, again, arguendo, that Londono was not entitled to Miranda warnings, notification of his status as a target of investigation, and assuming that the affidavit on its face, sets forth probable cause to believe that at least one

of the two statements alleged therein was "false" and "material", or, that materiality is not an element of a violation of the false statement clause of §1001, and, even assuming further, that the affidavit may fairly be read to include the allegation that Londono denied in so many words taking more than five thousand dollars out of the United States, all of these statements as a matter of law fell beyond the reach of the statute.

18 U.S.C. §1001 has had a long and checkered history, and as a result, its literal reach exceeds its intended grasp. Because the false statements clause does not require that the statement be made under oath, may not require a showing of materiality, United States v. Silver, supra, and carries a penal sanction more severe than the perjury statute, 18 U.S.C. §1621, it literally swallows perjury whole, together with a plethora of other Federal statutes proscribing the making of false representations with respect to specific agencies and activities of the United States. See United States v. Bedore, 455 F.2d 1109, 1110 (9th Cir. 1972). Accordingly, in applying the gloss of judicial construction to the statute, the Court's have limited its substantive scope in a manner which comports both with its history and with constitutional considerations. See United States v. Beer, 518 F.2d 168, 170-171 (5th Cir. 1975); United States v. Moore, 185 F.2d 92, 95 (5th Cir. 1950).

Originally enacted as a response to a host of frauds perpetrated upon the government by unscrupulous military personnel during the civil war era, the statute, in its original form proscribed the making of false claims for payment by military personnel to any person or officer within the civil or military service of the United States and the making of false statements for the purpose of securing the payment of any false claim by these departments and agencies. The statute was later broadened to include all persons, not just military personnel, and any false statement made for the purpose of cheating or swindling or defrauding the United States.

In 1934, against the backround of the tremendous growth in the number and powers of Federal regulatory agencies, and in response to the so called "hot oil" scandals, the statute was amended again in order to permit it to reach non-monetary frauds. To accomplish this objective, the language of the statute which restricted its reach to false statements which had as their purpose the securing of money through false or fraudulen means, was eliminated. See, generally, United State v. Bramblett, 348 U.S. 503 (1955). Thus, although very broad in its language, the statute was intended to reach those false statements made to government agencies which, whether related to the obtaining of money or not, had the effect of perverting or obstructing the agency in the execution of its statutory functions. See United States v. Gilliland,

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312 U.S. 86 (1941). But it do not appear to have been the intention of the Congress to have included within the reach of the statute any false statement no matter how trivial and no matter what the circumstances under which the statement was made.

Certainly, a broad, literal, and unrestrained reading of the statute rubs uncomfortably up against the Fifth Amendment, and, indeed, it is at the interface between the statute and the Fifth Amendment that the Courts have erected the "exculpatory no" exception to \$1001. Thus, where a defendant is interrogated by Federal officers, acting not in an administrative or purely investigative capacity, but for the purpose of gathering evidence against the defendant, and particulary where the defendant is unaware of this target status, the Courts have uniformly held that the defendant does not commit a violation of \$1001 when he gives false exculpatory answers rather than assist the government in building a case against him.

While the Circuits have not been uniform in their approach to or analysis of this problem,* any dichotomy

^{*}There are no Second Circuit cases directly in point; thus far, the Court of Appeals has declined to pass upon the "exculpatory no" exception. See, e.g., United States v. McCue, 301 F.2d 452, 455 (2d Cir. 1962); United States v. Adler, 380 F.2d 917, 922 (2d Cir. 1967).

of result is more apparent than real, and derives from variations in the facts rather than in different perceptions of the reach of the statute. Any fair analysis of the cases reveals that where a defendant, upon whom a criminal investigation has focused, and as to whom the investigation has reached or virtually reached the accusatory stage, gives false responses to the questions of Federal police agents — that is to say, under just those circumstances presented here—no Court has hesitated to find that such responses fall outside the parameters of §1001.*

Taking as their starting point the legislative history set out in detail in <u>United States v. Bramblett</u>, supra, and <u>United States v. Gilliland</u>, supra, the Courts

^{*}It is important to note that we are not here concerned with situations in which the defendant makes an affirmative effort to mislead or subvert a Federal agency in the execution of its functions, as, for example, where the defendant makes a false complaint to the F.B.I. for the purpose of inducing the investigation of others, United States v. Adler, 380 F.2d 917 (2d Cir. 1967), or, where the defendant files false net worth statements with the Internal Revenue Service, Cohen v. United States, 201 F.2d 386 (9th Cir. 1951); or where, having been advised of his rights and afforded the assistance of counsel, the defendant deliberately gives false statements after volunteering to appear before the Internal Revenue Service, United States v. McCue, supra. That these are illustrative of situations clearly intended by the Congress to fall within the statute is not disputed here.

have held that a false exculpatory denial of criminal activities does not fall within the prohibition of §1001 either because:

- a) Such statements do not relate to matters within the <u>jurisdiction</u> of a Federal agency, <u>United States v. Levin</u>, 133 F.Supp. 88 (D.Colo. 1953), or;
- b) An exculpatory denial is not a "statement", United States v. Stark, 131 F.Supp. 190 (D.Md. 1955), or;
- c) Such denials do not pervert the authorized functions of Federal investigative agencies, <u>United States v.</u> Philippe, 173 F.Supp. 582 (S.D.N.Y. 1959).*

Transcending these disparate analyses, we submit, is the common, unifying presence of the Fifth Amendment. The steadfast refusal of the Courts to extend \$1001 to circumstances such as those of the present case is due most significantly to Fifth Amendment concerns. Thus, for example, in <u>United States v. Davey</u>, 155 F.Supp. 175, 178 (S.D.N.Y. 1957), where the defendant had given a false name in registering for the draft, and then denied to F.B.I. agents that he had so used a false

^{*}In United States v. McCue, supra, the Second Circuit repudiated both the result and analysis of Philippe to the extent that Philippe purported to reach beyond the "exculpatory no" exception. To the extent, however, that Philippe is confined to that context, it apparently survives McCue. See, e.g., United States v. Bush, 503 F.2d 813 (5th Cir. 1974), United States v. Chevoor, 526 F.2d 178 (1st Cir. 1975).

name at a time when the F.B.I. was preparing a draft evasion case against him, the Court held that his false exculpatory denial did not come within the prohibition of \$1001 because it did not and could not subvert the authorized functions of the F.B.I. In so holding, the Court eloquently juxtaposed the statute against the Fifth Amendment:

But can it be said that when an accused person, a potential defendant, a suspect, grants an agent of the Federal Bureau of Investigation an interview and, in reply to an incrininating question, knowingly makes a negative answer, when truth and morality, but not the law, requires an affirmative reply, such answer perverts the authorized function of the Bureau? Is the authorized function of the Bureau to extract from the suspect only the truth, or, in view of the Fifth Amendment, proscribing compulsory self-incrimination, to hear and record only such statement as the accused desires freely and voluntarily to make? Preterermitting whatever question, if any, is involved on this score, but feeling that the Federal Bureau of Investigation would be the first to claim only the latter function, I fail to see that the giving, receiving, and recording of such a false statement perverts the true function of the Federal Bureau of Investigation.

See also <u>United States v. Ehrlichman</u>, 379 F.Supp. 271 (D.D.C. 1974), <u>Paternostro v. United States</u>, 311 F.2d 298

(5th Cir. 1962), <u>United States v. Stark</u>, <u>supra</u>, <u>United States</u> V. Levin, <u>supra</u>, <u>United States v. Philippe</u>, <u>supra</u>.

Directly in point in the present case because of its factual similarity and because the Court there tackled the Fifth Amendment issues raised by the "exculpatory no" cases head-on rather than retreating to a scholastic analysis of the formal requirements of the statute, is United States v. Bush, 503 F.2d 813 (5th Cir. 1974). In Bush, the Internal Revenue Service had discovered through an investigation of the tax returns of one Victor Corona that Bush had paid kickbacks to Corona in exchange for Corona's assistance in securing a local school board construction contract for Bush. Agents of the Internal Revenue Service interrogated Bush with respect to his knowledge of or participation in any kickback scheme involving Corona. When Bush, in substance, denied any knowledge of or involvement in such a scheme, the agents reduced his denial to writing, administered an oath, and thus obtained an affidavit from Bush. Approximately a year later, apparently after it had solidified its case against Corona, the agents returned to Bush and obtained a second affidavit from him which essentially repeated the averments contained in the first. The second affidavit was the subject of a false statements prosecution against Bush.

Agents were in possession of information directly linking the defendant with criminal activity at the time they confronted the defendant for the purpose of obtaining statements from him. There, as here, the defendant was neither apprised of his Fifth Amendment privilege nor informed of his target status, nor in any way made aware of the trap about to be sprung on him. There, as here, the defendant was placed in a situation not of his own making in which any statement he could have made would have been incriminatory, and thus, where his only viable alternative was silence. Reaching the issue of whether Bush's false affidavit was within the ambit of \$1001 sua sponte, the Court set forth its holding against the backdrop of the Fifth Amendment:

This Court is ... well aware of that portion of the Fifth Amendment to the United States constitution which says 'no person ... shall be compelled in any criminal case to be a witness against himself, ... 'If, then, under the facts before us we allow Bush's conviction to stand, Bush will have been convicted by his own words given to an investigative officer of the United States government, who at the time suspected Bush of unlawful activity. None of the evidence gives any indication that Bush knew he was under suspicion, or that he had a right to remain silent in order to avoid self-incrimination.

The specific facts of the case before us can lead to only one conclusion: Bush cannot be prosecuted for making a statement

to Internal Revenue Service agents when those agents aggressively sought such statement, when Bush's answer was essentially an exculpatory 'no' as to possible criminal activity, and when there is a high likelihood that Bush was under suspicion himself at the time the statement was taken and yet was in no way warned of this possibility.

United States v. Bush, supra; at 818-819*

Similarly, here, Londono's oral statements to his custom's agent interrogators were not, as a matter of law, false statements within the reach of \$1001. It follows, a fortiori that the "false statement" allegations contained in the Annunziato affidavit could not form the predicate for the issuance of a search warrant because they failed as a matter of law, to show probable cause to believe that Londono had committed a Federal crime and, therefore, that the things sought to be siezed were the fruits or instrumentalities of/or evidence of the commission of a Federal crime. See United States v.

Brouilette, 478 F.2d 1171 (5th Cir. 1973), United States v.

Birrell, 242 F.Supp. 191, 201 (S.D.N.Y. 1965), Tripodi v.

Morgenthau, 213 F.Supp. 735, 738 (S.D.N.Y. 1962), Thomas v.

^{*} It is thus clear that Bush's status as an unknowing target of criminal investigation and the Hobson's choice with which he was faced at the time of his interrogation were the critical factors in the result. Compare, United States v. McCue, supra, in which the defendants voluntarily appeared before the I.R.S. accompanied by counsel, and were well informed as to the nature and purpose of the I.R.S. interrogation of them.

United States, 376 F.2d 564 (5th Cir. 1967).* To the extent, therefore, that justification for issuance of the warrant stemed from Londono's claimed violation of §1001, the warrant was invalid and the search it purported to authorize illegal.

B. THE LACK OF PROBABLE CAUSE WITH RESPECT TO A VIOLATION OF 31 U.S.C. §1101(b).

The sole remaining justification for issuance of the warrant is the allegation that there was probable cause to believe that Londono had violated provisions of the Bank Secrecy Act, 31 U.S.C. §1101 et. seq. The appropriate starting point for analysis is the statute itself.

31 U.S.C. §1101 requires that any person who transports or causes to be transported "monetary instruments" from the United States in excess of five thousand dollars must file a report of the transaction. The statute does not specify when the report must be filed; regulations promulgated by the Secretary of the Treasury pursuant to the authority vested in him by the legislation, however require that the appropriate report be filed "at the time of departure, ... unless otherwise directed or permitted by the commissioner of customs."

31 C.F.R. §103.25(b). Thus, the obligation to file the re-

^{*}Brouilette, Birrell, Tripodi, and Thomas, all involve situations in which there is probable cause to believe that a state, rather than Federal crime has been committed. But it perforce follows that a warrant may not properly issue when the affidavit fails to establish the commission of any crime at all.

port arises at the time of departure, and not before.* Indeed, this view of the regulation seems to be shared by those who enforce it. In Singleton v. Commissioner of Internal Revenue, 65 TC, #96 (March 18, 1976), for instance, customs agents did not discover that Singleton, a passenger on an international flight, was carrying more than five thousand dollars on his person until after he had picked up his boarding pass, passed through the departure area, had his carry-on luggage searched, and had been frisked for weapons immediately before boarding the aircraft. The frisk of Singleton by customs inspectors disclosed bulges in his coat pockets; a more thorough search disclosed that the bulges were wads of one hundred dollar bills. Upon thus discovering that Singleton was carrying more than five thousand dollars cash, customs agents supplied him with the appropriate form, and, after he had completed it, permitted him to board his flight.

In the present case, on the other hand, Londono was arrested immediately after the customs agents discovered that he had more than five thousand dollars in his possession and well before he had even entered the Avianca departure lounge,

^{*}The statute requires that any person who transports or causes to be transported "monetary instruments" out of the United States must file a report. The regulations, however, make clear that when two or more persons are associated with a single transaction, only one of them need file the appropriate form. See 31 C.F.R. §103.23(d).

that he had to fill out and file the appropriate form at the time of departure* nor given a form to fill out. Instead, he was summarily arrested. There was here, therefore, no violation of \$1101. Rather, by denying Londono an opportinity to comply with the law the agents violated the Treasury Department regulations which set forth the circumstances under which such reports must be filed, and thus attempted to bootstrap non-criminal behavior into probable cause for the issuance of a search warrant.**

United States v. Jones, 368 F.2d 795 (2d Cir. 1966) is dispositive here. In Jones, the defendant, who had pre-

^{*}According to the stipulation of facts and the Annunziato affidavit, Londono was advised of the provisions of Title 31 §1101 just prior to his interrogation. As noted above, however, the statute does not provide any guidance whatever as to when the obligation to file the report arises.

^{**31} U.S.C. §11 05 provides for the issuance of search warrants upon a showing of propable cause to believe that "monetary instruments" with respect to which a report has not been filed are in the process of transportation. Here, although Londono's luggage was, arguably, "in the process of transportation, "his obligation to file the appropriate report had not yet accrued. Indeed, the Annunziato affidavit fails to allege that Iondono had not filed the appropriate report; nor does the affidavit state whether any effort had been made to determine whether any other person associated with the transaction had filed a report, thus relieving Londono of any personal obligation to do so. See 31 C.F.R. \$103.23(d). Thus, on its face, the affidavit fails to set forth probable cause to believe that "monetary instruments" with respect to which a report had not been filed were in the process of transportation. The principle thrust of our position, however, transcends this facial insufficiency of the affidavit and goes to the heart of the question of whether Londono committed any crime at all, cognizable under the laws of the United States.

viously been convicted of a narcotics offense, had left the United States without registering as then required by law.

18 U.S.C. \$1407*. The statute required that when any person who was addicted to the use of narcotcs, or who had previously been convicted of a narcotics offense, left the United States, he was to report that fact on a registration form, a copy of which remained in the custody of the Customs Service, and the original of which the addict/former violater was to surrender upon his return. Regulations promulated pursuant to the authority of the statute provided that if a person failed to register upon his departure from the United States, he was to register on appropriate forms immediately upon re-entering the United States.

Jones had left the United States for Canada without filing the appropriate form. Canadian officials deported him, and, immediately upon his arrival in the United States, Jones was accosted by customs agents. After determining that Jones had a previous narcotics conviction, a fact which Jones readily admitted, the agents asked if he had the appropriate certificate on his person. Jones replied that he did not, but expressed the view that he was not required to register because his narcotics conviction was more than ten years old. After the agents informed Jones that here was no such dispensation in the law, after the agents again

^{*§1407} was repealed in 1970. Pub.L. 91-513, Title III, § 1101(b)(A), O ctober 27, 1970, 84 Stat. 1292.

warned Jones that he was required to register, and after Jones repeated, for the second time, his opinion that he was not required to register, the agents arrested him.

Thus, in Jones, as in the present case, the defendant was arrested without being afforded an opportunity to conform his conduct to the law. There, as here, customs agents charged with the execution of a law requiring the filing of documents failed to provide the defendant with the appropriate documents, but instead, arrested him. There, as here, the relevant regulation plainly contemplated that the appropriate form be given to those as to whom the obligation to file the form is apparent to customs agents. Indeed, construing the regulation applicable in Jones in precisely this fashion, the Court of Appeals reversed his conviction and directed the entry of a judgement of acquittal in his behalf. The Court held:

Our decision [to reverse] rests on the principle that because the government has failed to follow its own regulation, promulgated in the proper exercise of the Secretary of the Treasury's discretion, its action can have no effect. In other words, having failed to supply Jones with [the appropriate] form ... and to give him the opportunity to register provided for in the regulation, his arrest and indictment are invalid. There is no novelty in

holding that where an official is given discretionary power by statute, promulgates regulations as to how the power is to be exercised and then fails to follow his own regulations, the action is of no effect.

United States v. Jones, supra, at 799 (citations omitted)

Indeed, the present case rests upon an even more compelling factual predicate. For Londono, unlike Jones, never refused to fill out the required form, and Londono, moreover, unlike Jones, was confronted by customs agents well before the obligation to file the report accrued. In addition, there is, in the present case, an added element of unfairness. The Court may take judicial notice of the fact that it is illegal to transport United States currency out of Colombia, Londono's native land. 31 U.S.C. §1101, of course, contains no such proscription, but it is not at all clear that Londono, surrounded by customs agents and interrogated through an interpreter was aware of the critical distinction.

Thus, the holding in Jones applies with even greater force in the present context. Londono had committed no crime. His premature and precipitous arrest was "of no effect" and, of course, no search warrant predicated upon Londono's claimed violation of 31 U.S.C. \$1101 could properly issue. See, United States v. Brouilette. supra, United States v. Birrell, supra,

Thomas v. United States, supra, Tripodi v. Morgenthau, Supra, See also Vitarelli v. Seaton, 359 U.S. 535 (1959). Accordingly, the search of Londono's luggage was illegal and its fruits must be suppressed. A fortiori, counts two and three of the indictment herein must be dismissed.

CONCLUSION

FOR ALL OF THE FOREGOING REASONS, LONDONO'S STATEMENTS TO CUSTOMS AGENTS MUST BE SUPPRESSED. IN ADDITION, Co. IN THE ALTERNATIVE, THE FRUITS OF THE SEARCH OF HIS LUGGAGE MUST BE SUPPRESSED. THE INDICTMENT SHOULD BE DISMISSED.

Respectfully submitted,

Of Counsel: JEFFREY D. ULLMAN IVAN S. FISHER
Attorney for the defendant
410 Park Avenue
New York, New York 10022
212/355-2380

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

HENRY GOMEZ LONDONO,

Defendant

STIPULATION OF FACTS

76 CR 153

TWEEN the defendant HENRY GOMEZ LONDONO, by his attorney Ivan

S. Fisher, and David G. Trager, United States Attorney for
the Eastern District of New York by Jeffrey H. Kay, and Charles
Clayman, Assistant U.S. Attorneys that this Stipulation of Facts is
to be used during the motion to suppress under Rule 41, F.R.Cr.P;
and for trial purposes.

- That on February 21, 1976, U.S. Customs Agents received information from D.E.A. Agents that a reliable D.E.A. informant had advised that an individual known as Henry Gomez Londono would depart the New York area for Colombia, South America during the period February 21, 1976 through February 25, 1976 taking with him \$100,000 in U.S. currency to complete a narcotics transaction.
- the following physical description of Henry Gomez Londono:

 Date of Birth October 12, 1950; brown hair; brown eyes;

 thick lips, broad nose; square hair line; Colombian passport
- 3. On February 21, 1976, U.S. Customs agents established a surveillance at the Pan American World Airlines Terminal At John F. Kennedy International Airport, Queens, New York, at the Avianca Airlines departure area.
- 4. On February 22, 1976, U.S. Customs Agents established a surveillance at the Pan American World Airlines

Terminal at John F. Kennedy International Airport at the Avianca Airlines departure area.

advised by an airline employee that an individual named Henry Gomez Londono was presently in the Avaianca Airlines area.

U.S. Customs agents observed Londono and determined this individual matched the description previously furnished by the informant.

Avianca Airlines departure area by non-uniformed Customs Agents.

J. Uniformed Customs Inspector Robert Como was brought over and identified himself to Londono as well as Customs Agents Healy and Annunziato, since Healy and Annunziato were in plain clothes. A Pan American employee acted as a Spanish interpreter.

viduals the following persons were present in the immediate vicinity when Mr. Londono was questioned: one Pan American employee and two Port Authority Police Officers. None of these individuals participated in the questioning or the arrest of Mr. Londono. The Police officers were regualrly assigned to the Pan American terminal to observe departing passengers.

Title 31, Section 1101(b): to wit, that he was required to make a report declaring any money he was taking out of the country in excess of \$5,000. He was then asked if he was taking out

es oon in currency.

1

Matter being asked a second time whether he had more than \$5,000, Londono told the Customs personnel he had \$900 in currency and showed the Customs people the cash he had in his pockets.

Agents an envelope from his jacket pocket and told the Customs people he did not know what was inside the envelope, after being asked a third time if he had more than \$5,000.

Customs Agent observed something green through an opening in the bulged envelope and opened the envelope and determined it contained \$10,000 in U.S. currency of \$100 denominations and a photograph of Londono.

Londono told the Customs personnel some people asked him to deliver the envelope to Bogota, Colombia.

Londono was told by U.S. Customs Agents that he was in custody. Airline ticket, passport and baggage claim tickets were then taken from Londono.

A. Luggage and cartons checked on board Avianca aircraft were removed by Customs: Agents and taken to U.S. Customs office at the International Arrival Building along with Londono.

18. Londono was then first advised of his constitutional rights at the International Arrival Building in Spanish and interviewed.

Londono was then taken to U.S. Customs office in New York City for fingerprinting and processing and lodged at MCC that night. Luggage and cartons were secured in the security area of U.S. Customs.

17 On February 23, 1976 Londono arraigned before U.S. Magistrate.

M. That the following items are the property of the

defendant Henry Gomez Londono and were found on his person or in his possession at the time of his arrest on February 22, 1976.

> Brown Documents Case Exibit #1. Colombian Passport M434962 #2. Passenger Ticket 8109:808:516 #3. Coupon 1 - Ticket 8109:808:515 #4. Avianca Excess Baggage Ticket 60345 #5. Baggage tickets 14-13-69, 14-k3-83, #6. 14-13-85 International Drivers License 343926 #7. International Vaccination Certificate #8. Henry Gomez Londono Colombia-Cedular Card No. 70.070.457 #9. Henry Gomez Londono Regis Camera Inc. Bill - 1 Television #10. Regis Camera Inc. Bill - Sony Stereo #11. Set #12. Regis Camera Inc., and Business Card White Envelope #13. \$10,000 U.S. Currency - \$100 denomina-#3.3A. tions. Small Yellow Envelope with photographs #13B. Sears Roebuck Invoice #1882840 #14. #15. Sears Roebuck Invoice #1882838 Black Wallet #16. Colombia Military Card 3-198234 #17. Henry Gomez Londono \$870 U.S. Currency-#18. Panasonic TV

search warrant in the three suitcases and Sony HP-319 carton checked in by the defendant Henry Gomez Londono to Avianca Airlines on February 22, 1976 at John F. Kennedy International Airport. These items were on board the Avianca Aircraft in the belly of the aircraft, when the luggage and cartons were removed by customs agents following the arrest of Londono and are the property of the defendant Henry Gomez Londono:

Exhibit #19. Suitcase (identified as #1)
#19A. Fvil Knievel Lunch Box
#19B. Evil Knievel Thermos
#19C. \$930-U.S. Currency in thermos
#19D. Snow White lunch box
#19E. Snow White Thermos
#19F. \$1070-U.S. Currency in thermos
#20. Suitcase (identified as #2)
#20A. Orange Chair Cushion

#20B. \$30,050-U.S. Currency in cushion #21. Suitcase (identified as #3) 26 Miscellaneous Photographs #21A. #21B. 6 watches #23. Sears Vacuum Cleaner Carton #24. Marx-Electro Shot Carton #25. Baggage Tags 14-13--93, 14-13-83 #26. Sony Stereo Music System HP-319 Carton #26A. Speaker (identified as #1) #26B. \$12,730 U.S. Currency from Speaker Colombian Passport P535126 #26C. Luis Octavio Ramirez Caro #27 Speaker (identified as #2) #27A. Radio-cassette in Speaker No. 2 #28B. Sony Stereo Music System Receiver-Phonogaph #28C. Piece Brown cloth Loaded 38 Caliber Smith Wesson-#28D. found in phonograph receiver #28E. Loaded-38 Caliber Colt revolver found in phomograph receiver.

20. That the following government exhibits would be used and introduced into evidence at a trial:

Exhibit #29. Customs Declaration of Henry Gomez Londono dated Dec. 13, 1975 #30. U.S. Immigration Form I-94 of Henry Gomez Londono, dated Dec. 13, 1975 #31. through 31P Color Photographs of Suitcase containing Clothes, lunch boxes and their contents #32. through 32(e) Color Photographs of Suitcase containing clothes and seat cushion and their contents #33. through 33D Color photographs of Suitcase containing clothes, watches, photographs through 34Q #34. Color Photographs of the Sony Carton, Speakers, speakers contents, receiver-Phonograph and contents.

HENRY GOMEZ LONDONO

IVAN FISHER, Esq.
Attorney for Defendant

DAVID G TRAGER United States Attorney

By:
JEFFREY H. KAY
Assistant U.S. Attorney

Sir Please take notice that the within is a (certified) true copy of a duty entered in the office of the clerk of the within name I court on 19

Dete ..

Yours, etc.

IVAN STEPHAN FISHER

410 PARK AVENUE NEW YORK, N. Y. 10022

NOTICE OF SETTLEMENT

Sir : Please take notice that an order

If which the within is a crue copy will be presented for ettlement to the Hon.

me of the judges of the within named Court, at on the day of M.

Yours, etc.

orney for

410 PARK AVENUE NEW YORK, N. Y. 10022

IVAN STEPHAN FISHER

Attorney for

IVAN STEPHAN FISHER

410 PARK AVENUE NEW YORK, N. Y. 10022 (212) 355-2380

Attorney for

Service of a copy of the within

is hereby admitted.

Dated.

Attorney for

U. S. Alif SEP 3 10 13 EAST. DIST.

RE(_1

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- against -

PREMISES KNOWN AS: THREE PLAID UNIVERSAL TRAV-LER BRAND IDENTIFIED BY AVIANCA AIRLINES TAGS FLIGHT 53 NO. 14-13-82, NO. 14-13-85, AND ONE PARASONIC TELEVISION SET MODEL NO. TR-632U SERIAL NO. PXJFF452; AND THREE CARTONS DESCRIBED AS ONE CARDBOARD BOX BEARING SEARS KUMMORE CAMMISTER VACUUM CLEANER SERIAL \$517190 TAG NO. 14-13-83; ONE CARDROARD BOX MARKED MAIN ELECTRO-SHOT TOY GUN, G-272A; AND ONE CARTON BEARING THE NAME SONY, HP 319 STEREO MUSIC SYSTEM.

Defendant.

-----X EASTERN DISTRICT OF NEW YORK, SS:

ROBERT ANNUNZIATO, being duly sworn, deposes and says that he is a Special Agent of the United States Customs Service, duly appointed according to law and acting as such.

Upon information and belief, the deponent has reason to believe that within the above-described premises within the Eastern District of New York, there is now being concealed approximately \$90,000 in United States currency in violation of Title 31, United States Code, Sections 1101(b), 1058, 1059 and Title 18, United States Code, Section 1001.

The source of your deponent's information and the grounds for his belief are:

1. Information received by your deponent on February 21, 1976 from Special Agent Cipriano, Drug Enforcement Administration, that a drug enforcement informant in Colombia, South America, had advised that an

AFFIDAVIT FOR SEARCH MARRANT individual known as HENRY GOMEZ LONDONO would depart the

New York area for Colombia, South America during the

period Pebruary 21, 1976 through February 25, 1976 taking

with him \$100,000 in United States currency to complete and

further a narcotic transaction. The informant also provided

a physical description of HENRY GOMEZ LONDONO, as follows:

Name - Henry Gomez Londono; Date of Birth - October 12, 1950;

Brown Hair; Brown Eyes; Thick Lips; Broad Nose; Square Hair

Line, Colombian Passport #535124.

- 2. On February 21, 1976, your deponent and other agents of the United States Customs Service established a surveillance at Pan American World Airlines Terminal at John F. Kennedy International Airport, Queens, New York at the Avianca Airlines departure area, located inside the Pan American Airlines Terminal.
- 3. On February 22, 1976, your deponent and other agents of the United States Customs Service established a surveillance at the Pan American World Airlines Terminal at John F. Kennedy International Airport at the Avianca departure area inside the Pan American terminal.
- 4. The information furnished your deponent on February 22, 1976 by an employee of the Pan American World Airways at the Pan American Terminal at the John F. Kennedy International Airport who advised that an individual named LOWDONO was presently in the Avianca Airlines departure area and the employee identified MENRY GOMEZ LONDONO.
- 5. Your deponent and other agents of the United States Customs Service approached the individual known as HENRY GOMEZ LONDONO and it was determined that this individual known as LONDONO matched the description previously furnished by the informant.

- 6. Uniformed United States Customs Inspector Robert Como identified himself to LONDONO and Ralph Flores, a Customer Service Representative of Pan American Airlines acted as an interpreter and advised LONDONO of the provisions of Title 31. Section 1101(b) and that he was required to make a report declaring any money he was taking out of the country in excass of \$5,000.
 - 7. Statements made by LONDONO to the agents of the United States Customs Service through the interpretor that he understood these provisions and he acknowledged that he was in possession of \$900 in United States currency.
 - 8. Agents of the Customs Service again asked
 LONDONO if he had an excess of \$5,000 in United States
 currency, and if he wanted to declare it. LONDONO then
 voluntarily showed to the Customs Agents he had \$900 in
 United States Currency in his possession. Immediately
 thereafter, LONDONO voluntarily took a white envelope from
 inside his jacket pocket and exhibited it to the Customs
 Agents explaining he did not know the contents of this
 envelope. Where upon the agents of the United States Customs
 Service opened the envelope and determined the contents.
 Containing there in was \$10,000 in United States currency
 all in \$100 denominations.
 - 9. One of the Special Agents of the United States Customs Service then arrested LONDONO and retrieved LONDONO's airline tickets and proceeded to the Avianca Aircraft where LONDONO was asked to pick out his luggage. The luggage and cartons checked by LONDONO were then taken to the International Arrival Building at John F. Kennedy International Airport where these items were then secured in the United States Customs Security area.

10. On February 23, 1976 Drug Enforcement Administration Agent Michael Tobin advised your deponent that he had spoken telephonically with the Special Agent in Charge, Octavia Gonzelez of the Drug Enforcement Administration, Bogota, Colombia this afternoon and that Gonzelez had advised him that the informant in paragraph one was a highly reliable source who furnished highly reliable information in the past and being that for security reasons Gonzelez could not furnish any details over the telephone as to the reliability of the informant regarding previous instances where information the informant had provided was both accurate and had led to successful arrest procedures.

WHEREFORE, your deponent respectfully requests
that a Search Warrant be issued authorizing your deponent
or any other Special Agents of the United States Customs
Service authorizing him or them to enter with proper assistance
the above-described premises and there to search for and to
seize the above-described currency or monetary instruments
which are being held in violation of law.

Robert Anningst

Sworn to before me this 24th day of February 1976 Max Schiffman U. S. Magistrate UNIZED USINTHS THE East UNIXED USINTHS THE EA

A TRUE COPY.

Max Schiffman
U. S. Magistrate
223 Cadman Plaza East
J. S. Makira New York D. W. York

RJD:JHX:1j1 F. # 761,255

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

Docket No.

Case No.

PREMISES KNOWN AS VS.
THREE PLAID UNIVERSAL TRAV-LER BRAND IDENTIFIED BY AVIANCA AIRLINES TAGS FLIGHT 53 NO. 14-13-82, NO. 14-13-85, AND ONE PANASONIC TELEVISION

SEARCH WARRANT

CARDBOARD BOX BEARING SEARS KENMORE CANNISTER VACUUM CLEAMER SERIAL #517190
TAG NO. 14-13-83; ONE CARDBOARD BOX MARKED MARK ELECTRO-SHOT TOY GUN, G-272A;

AND TRONG CARTON BEARING THE NAME SONY; HP 319 STEREO MUSIC SYSTEM.

TO: ANY SPECIAL AGENT OF THE UNITED STATES CUSTOMS SERVICE Affidavit(x) having been made before me by ROBERT ANNUNZIATO, Special Agent

that he has reason to believe that { MANCHE PREPARTOR on the premises known as } on the above

in the Lastern

District of New York

there is now being concealed certain property, namely approximately \$90,000 in United

States currency in violation of Title 31, United States Code, Sections 1101(b), 1058, 1059 and Title 18, United States Code, Section 1001

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of 24 hb:

(not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search { in the daytime (6:00 a.m. to 10:00 p.m.) } and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written investory of the property seized and promptly return this warrant and bring the property before the Sold-Street are required by law.

U. S. Polyd Jole examples 2:3 Codman Plaza East Breaklen, New York 11201

Dated this 24th day of February

Judge Consent & State Court of Record of Francis Sur

*The Lederal Rules of Commond Procedure provide: "The warrant shall be served in the daytime, unless the assume auditoring by appropriate provision in the moderal, and for reasonable come shown, authorize its execution of times other than daytime." (Rule 41(c)): A higherment of grounds for reasonable come shown, authorizes its execution of times other than daytime? (Rule 41(c)): A higherment of grounds for reasonable come shown, authorizes its execution of times other than daytime, unless the 41(c).

A-986

RETURN

I received the attached search warrant	, 19 , and have executed it a	.5
follows:		
On , 19 at o'clock scribed in the warrant and	M, I searched the person or premises de	>-
I left a copy of the warrant with	name of person searched or owner or "at the place of search"	- 100
together with a receipt for the items seized.		
The following is an inventory of property taken purs	uant to the warrant:	
	· · · · · · · · · · · · · · · · · · ·	
This inventory was made in the presence of		
and		
I swear that this Inventory is a true and detailed warrant.	account of all the property taken by me on t	he
Subscribed and sworn to and returned before me	this day of , 19	
	Control At	
	Federal Magistrate	

A 99 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK 355- 2000 UNITED STATES OF AMERICA Docket No. - against -76 CR. 153 HENRY GOMEZ-LONDONO, Defendant. GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT LANDONO'S MOTION TO SUPPRESS DAVID G. TRAGER United States Attorney Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201 Jeffrey H. Kay Assistant U.S. Attorney (Of Counsel)

A 100

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

v

UNITED STATES OF AMERICA

- against -

Docket No. 76 CR. 153

HENRY GOMEZ-LONDONO,

Defendant.

· x

GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT LONDONO'S MOTION TO SUPPRESS

> DAVID G. TRAGER United States Attorney Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201

Jeffrey H. Kay Assistant U.S. Attorney (Of Counsel)

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INTRODUCTION

The Government contends that due to the noncustodial interrogation of defendant Londono, there
was no requirement that he be given the "Miranda warnings" by the customs agents. Moreover, it is argued
by the Government that the subsequent search of defendant Londono's luggage pursuant to a search warrant issued
by the United States Magistrate, Eastern District of
New York was lawful and that the affidavit in support
of said search warrant was sufficient. It is, therefore,
contended that both the statements of defendant Londono
as well as the evidence seized pursuant to this search
warrant is admissible in the Government's case-in-chief.

PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of the Government in opposition to defendant Londono's motion to suppress statements made by Londono and physical evidence seized by U.S. Customs Agents.

On March 21, 1976, the defendant Henry Gomez

Londono was charged in a three count indictment with violations of Title 18, U.S.C., Section 1001 (Count 1); Title 31, U.S.C., Section 1101(b) (Count 2); Title 18, U.S.C., Section 922(e) (Count 3).

The United States and the defendant have agreed to a non-jury trial and have consented to the disposition of both the suppression issues and the merits of the case on the written stipulation of facts submitted to the Court. Incorporated as part of this stipulation is the affidavit of Special Agent Robert Annunziato, which was the basis for the issuance of the search warrant.

^{1/} See Stipulation of Facts, Exhibit A; Affidavit for Search Warrant of Customs Agent Robert Annunziato, Exhibit B and Defendants Waiver of Jury Trial, Exhibit C.

STATEMENT OF FACTS

On February 21, 1976, Drug Enforcement Administration Agents advised United States Customs Agents that a D.E.A informant in Colombia, South America had furnished information that an individual known as Henry Gomez Londono would depart the New York area for Colombia, South America during the period February 21, 1976 through February 25, 1976, taking with him \$100,000 in United States currency to complete a narcotics transaction. The informant provided a physical description of Henry Gomez Londono, as follows: Date of Birth, October 12, 1950; Brown Hair; Thick Lips, Broad Nose; Square Hair Line; and Columbian Passport #535124. A check with Avianca Airlines disclosed no reservations in the name of Londono for February 21, 1976 and February 22, 1976. However, on February 21 1976, customs agents established a surveillance at the Avianca departure area, in the Pan American World Airways Terminal at John F. Kennedy International Airport, Queens, New York. The surveillance continued and on February 22, 1976, at approximately 5:45 p.m., a Pan American employee advised the customs agents that an individual named Londono was presently in the Avianca departure area, and pointed out Londono to the agents.

At this time the two customs agents, who were not in uniform, approached the individual pointed out and determined that he matched the description that they had previously received from the D.E.A. informant.

At this point, the customs agents were joined by a uniformed customs inspector and an employee of Pan American, who acted as a Spanish interpreter. The inspector, through the interpreter, advised Londono of the provisions of 31 U.S.C. & 1101(b) which required the filing of a customs form declaring any money that he may have been taking out of the country in excess of \$5,000. Present in the general area were two Port Authority Policemen and another Pan American employee; however none of these individuals participated in the questioning of Londono. The two officers were on their regular patrol assignment at the Pan American building on that date. Londono acknowledged, through the interpreter, that he understood these provision, and expressed no desire to file such a form. When asked a second time if he had more than \$5,000, Londono replied that he had only \$900 in currency and 'took a sum of money out of his pants pockets and showed it to the customs agents.

Londono then voluntarily removed an envelope from inside his jacket and handed it to a customs agent and told the agent that he did not know its contents. The customs agent observed something green in the envelope and opened the envelope in front of Londono and the other customs officials: The envelope contained \$10,000 in United States currency, all in \$100 denominations. Londono was asked who had given him the money, and he replied that "some people" gave him the money to deliver to Bogota, Colombia. At this point Londono was advised he was being taken into custody. The money and documents were then seized by the customs agents.

Londono was then escorted to the Avianca airplane by the customs at hts, where his luggage was retrieved from the aircraft. He was then taken, together with his luggage, to the U.S. Customs Office at the International Arrivals Building at the airport, where the luggage was secured in a ctates sustoms Security area. Londono was then advised of his constitutional rights in Spanish.

On February 23, 1976, Londono was arraigned before a U. S. Magistrate in the Eastern District of New York.

On the morning of February 24, 1976, a search warrant was issued by the United States Magistrate

authorizing the search of the luggage and cartons belonging to Londono, which had been retrieved from the Avianca aircraft on February 22, 1976. The subsequent search of the luggage and cartons described in the search warrant by customs agents revealed \$930 in United States currency secreted in a thermos bottle; \$1,070 in United States currency secreted in another thermos bottle; \$30,500 in United States currency concealed in the cushion of a chair; \$12,730 in United States currency concealed in a speaker; and two .38 caliber revolvers and ammunition concealed in a phonograph turn table. Numerous photographs and another Colombian passport were discovered concealed in the luggage.

On March 2, 1976 the instant indictment was returned.

POINT I

THE FAILURE TO ADVISE DEFENDANT OF HIS MIRANDA 1/ RIGHTS WHEN INITIALLY QUESTIONED WAS NOT ERROR: THE QUESTIONING WAS NON-CUSTODIAL

Defendant contends that he should have been advised of his rights, as required by Miranda v. Arizona,

384 U.S. 436 (1966), at the time he was stopped in the departure area. The short answer to this is that since the stop and subsequent questioning of Londono was non-custodial, the Miranda warnings were not required. Hence, the statements of Londono are admissible.

The rule is undisputed: The Miranda warnings are required only if the interrogation is custodial.

Orozoco v. Texas, 394 U.S. 324 (1969). The relevant inquiry is, therefore, was the questioning of Londono custodial? The Second Circuit, in United States v. Hall, 421 F.2d 540, 545 (2d Cir. 1969), cert. denied, 397 U.S. 990 (1970), set forth the test to be applied in determing whether the questioning is custodial, or, in other words, at what point the Miranda rights must be given. The Court held that in the absence of actual arrest something must be said or done by the authorities, either in their manner of approach or in the tone or extent of their question, which indicates that they would not have heeded a request

^{1/} Miranda v. Arizona, 384 U.S. 436 (1966)

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which indicates that they would not have heeded a request United States v. Clark, 525 F.2d 314, 316 (2d Cir. 1975) and United States ex rel. Sanney v. Montanye, 500 F.2d 411 (2d Cir.), cert. denied, 4119 U.S. 1027 (1974).

Application of this test, to the facts here, shows that defendant was not so detained. Not only had there been no arrest, but defendant Londono was not led to believe that he was being taken into custody or that the agents would not have heeded his reqest to depart. Although the stop was caused by information received from a narcotics informant, the agents were not, contrary to defendant's assection conducting a narcotics investigation. They were simply inquiring into a suspect violation of 31 U.S.C. §1101(b). Moreover, defendant was not, as he asserts in his memorandum (contrary to the facts as stipulated), "surrounded by uniformed and non-uniformed law enforcement officers" (Def. Br. p. 3), which, as his argument seems to run, somehow caused a custodial situation. This, simply, is not what happened. Defendant Londono was stopped on an open, public corridor for questioning just before he entered the departure area. This is a far cry from the coercive, in-custody situation that Miranda was designed to eliminate.

Finally, in Chavez-Martinez v. United States,

407 F.2d 535, 539 (9th Cir.), cert. denied, 396 U.S. 858 (1969), the Ninth Circuit, in a border case, held that "the warning required in Miranda need not be given to one who is entering the United States unless and until the questioning agents have probable cause to believe that the person questioned has committed an offence, or the person questioned has been arrested, whether with or without probable cause." See United States v. Luther, 521 F.2d 408 (9th Cir. 1975). Although dealing with a border case in which the person entering is subject to search pursuant to 19 USC 1582, Chavez-Martinez seems apt. The mere fact of questioning at the airport, either in connection with entry and departure, should not, in the absence of a custodial environment, require the Miranda warnings.

Accordingly it is submitted that the statements of defendant Londono are admissible.

THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT WAS SUFFICIENT

Defendant's claim concerning the insufficiency of the affidavit is twofold: (1) that there was no probable cause to establish a violation of 18 U.S.C. \$1001 due to the alleged "truth" of defendant's statement to the agents and because of the "exculpatory no" defense; and (2) that there was no probable cause to establish a violation of 31 U.S.C. \$1101(b), because defendant, allegedly, was arrested prior to "the time of departure". It is submitted that the affidavit was sufficient and that, therefore, the motion to suppress should be denied.

Turning to the claim that defendant Londono spoke the truth to the agents and that because his responses were not "false statements" there, was no probable cause to believe that there had been a violation of 18 U.S.C., it is submitted that this argument, although disingenuous, is frivolous. Londono, when initially questioned was advised that federal law required a report if he was taking more than \$5,000 in currency out of the country and he was asked if he understood this requirement. To this clear

and unambiguous question, Londono stated that he understood, and then, in response to the further inquiry whether he had more that \$5,000, Londono replied that he only had \$900 in currency. It was following this colloquy that the envelope containing \$10,000 in currency was discovered, under the circumstances set forth above and similarly detailed in the affidavit. This statement, then, was clearly false, albeit Londono protested that he was unaware of the contents of the envelope.

For purposes of this suppression motion, it is only necessary to look at the facts which were presented to the magistrate, in order to determine if probable cause existed. It is not necessary to determine whether the magistrate had "facts sufficient" to prove guilt at trial. Cf. Draper v. United States, 358 US 307,311-12 (1959). To a man of reasonable caution, Londono's statement that he did not know that the envelope he was carrying in his inside jacket pocket contained \$10,000 in cash is incredible. Indeed, any other conclusion would be simply contrary to reason and common-sense.

Next, defendant argues that the "exculpatory no" defense to 18 U.S.C. \$1001 prosecutions, a defense that the Second Circuit has refused to adopt, somehow violates the probable cause otherwise set forth in the affidavit. The short answer is that this trial defense has simply not been adopted in this Circuit. United States v. Adler, 308 F2d 917, 921-22 (2nd Cir. 1967). There, the fact that the allegedly false statement was made to a custom agent during the course did not constitute a defense to the change and the Court refused to exclude statements to law enforcement officials from coverage under \$1001. The Adler Court held that "a technical construction which would exclude from the scope of \$1001 all matters strictly criminal in nature, is rejected" (Id. at p. 922). Accord United States v. Goldfine, 538 F2d 815, 820-821 (9th Cir. 1976). This construction of \$1001 has been accepted by the United States Supreme Court in Bryson v. United States, 396 U.S.64, 70 (1967) where the majority opinion cited Adler with approval.

Defendant also contends that there was and could be no violation of 31 U.S.C. §1101(b) since he was stopped as "he walked towards the Avianca Airlines departure area"

(Stipulation of Facts, para. 6A) and that this was not, at such time and place as required by the Secretary of the Treasury pursuant to \$1101(b). The relevant regulation provides such report to be filed "at the time of departure". 31 C.F.R. \$103.25(b).

This argument overlooks the undisputed fact that the luggage had already been loaded onto the airplane. Therefore, there was certainly reasonable cause to believe that, as stated in the affidavit, "there is now being concealed approximately \$90,000 in United States currency in violation of Title 31, United States Code, Sections 1101(b), 1058 and 1059." (Affidavit, p. 1). Moreover, Londono himself was about to enter the departure loungecertainly, this was "at the time of departure". To construe the language of the regulation to require the traveler to be inside the departure area would exalt form over substance and eviscerate the statute. In this regard, the Tax Court decesion cited by defendant, Singleton v. Commissioner of Internal Revenue, 65 T.C. #96 (March 18, 1976, Prentice-Hall Tax Court Reported and Memorandum Decisions; (65.96) is simply not inpoint. The Singleton case involved a jeopardy assessment and the Tax Court held that an illegal airport search, under the circumstances

in that case, did not taint the subsequent IRS investigation.

It is also important to note that 31 U.S.C. \$1105 provides for the issuance of a search warrant for "[o]ne or more designated or described letters, parcels, packages, or other physical objects", upon probable cause that "montary instruments are in the process of transportation". This is what was done here. The luggage, already loaded aboard the airplane was in the "process of transportation". Accordingly, it is submitted that the search warrant was properly issued.

CONCLUSION

It is respectfully submitted that the motions to suppress the physical evidence and the statements of the defendant, in all respects, should be denied.

Respectfully submitted,

DAVID G. TRAGEP United States Attorney Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201

Jeffrey H. Kay Assistant U.S. Attorney (Of Counsel)

117 BJF: JHK: lm November 5, 1976 Honorable John F. Dooling, Jr. United States District Judge Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201 United States v. Henry Gomez Londono 76 CR 153 Dear Judge Dooling: On October 22, 1976 the Second Circuit Court of Appeals decided United States v. Jaime E. Dorr III and Roger Druger, F.2d (2d Cir. slip opn. 5904, October 22, 1976). Because we believe that this decision is relevant to the Londono motion, pending before this court, it is being brought to Your Honor's attention. In United States v. Corr, supra, the Court considered the applicability of 18 U.S.C. \$1001 to a nonresponsive volunteered false statement. The Court stated: "Where the answer is false the fact that it is unresponsive is immaterial. The crime is based on the explicit statement rather than on an unstated implication. Thus the falsity is not conjectual and the proof of falsity is not premised on inferences attempted to be extracted from the fact of unresponsiveness.

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UNITED STATES OF AMERICA

76 Cr. 153

-against-

HENRY GOMEZ LONDONO,

Defendant

MEMORANDUM OF LAW

I INTRODUCTION

During the oral argument in the above entitled case, there arose the issue of whether the defendant could legitimately assert the Fifth Amendment privilege regarding questions asked him by Customs agents during their encounter at the airport. While this matter is treated briefly in defendant's original memorandum of law, at pages 7-8, counsel requested the opportunity to brief the issue in more detail. This memorandum of law is respectfully submitted, with reference to that issue.

ARGUMENT

DEFENDANT PROPERLY HAD A FIFTH AMENDMENT PRIVILEGE TO REFUSE TO ANSWER THE QUESTIONS ASKED BY CUSTOMS AGENTS.

The issue here is conveniently subdivided into two separate questions: first, whether Londono had any affirmative obligation to respond to the oral questions put to him; and second, whether the information sought by customs agents was information as to which Londono could legitimately assert the privilege.

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That Londono had no affirmative obligation to respond to the agent's oral questions is abundantly clear. First, the applicable statute, 31 U.S.C.§1101 (b), and the relevant regulations require only that one leaving the United States with more than Five Thousand dollars submit a written report to that effect. The statute, of course, does not require making any oral declarations. Moreover, as previously argued, the obligation to file the report does not arise until one leaves the country. Indeed, Londonc could have avoided the necessity of filing the form in any number of ways. See Defendant's original Memorandum of Law, at 7-8. See also United States v. Clark, 464 F.2d 667 (2d Cir. 1973); United States v. Bell, 475 F.2d 240 (2d Cir. 1973).

Beyond this, however, it is clear that Londono could have asserted the Fifth Amendment privilege regarding specific questions on the form, and, thus, could have submitted the appropriate document in that fashion.

Under analogous circumstances, the Supreme Court has held that a taxpayer may assert the Fifth Amendment privilege on his income tax return with respect to incriminatory information demanded on the form. See, United States v. Sullivan, 274 U.S. 259, 263 (1927); Garner v. United States, supra, 18CLR (March 23, 1976). It is important to note that, in Garner, the Supreme Court recognized that a taxpayer may assert the Fifth Amendment privilege with respect to specific

information requested on a tax return. Garner v. United States, supra, 18 CIR at 3095. In addition, the Court in Garner, found that nothing in California v. Byers, 402 U.S. 424 (1971) undercut Sullivan. Discussing Byers, the Court pointed out in Garner:

"Although there was not a majority of the Court for any rational for the Boats holding, the Court addressed there only the basic requirement that one's name and address be disclosed (in connection with an automobile coldent report). The opinions upholding the requirement suggested that the privilege might be claimed appropriately against other questions. 402 U.S. at 434 note (opinion of Burger, C.J.,)457-458, (Harlan, J. concurring in the judgement). Byers is thus analagous to Sullivan, holding only that requiring certain basic disclosures fundamental to a neutral reporting scheme does not violate the privilege. Id., at 3098 n.16

was more than "neutral;" moreover, the reporting scheme established by 31 U.S. C. §1101 et seq., is more than neutral. The avowed purpose of the statute is to gather information of assistance in the detection and prosecution of narcotics traffickers and gamblers. See California Banking Association v. Schultz;

416 U.S. 21 (1972).

Here, Londono was asked more than just his name and address. He was asked questions designed to elicit information which would have had a number of incriminatory effects. First, confirming his removal of more than \$5,000 from the country would have corroborated the informant from whom the DEA had learned that Londono was preparing to engage in a narcotics transaction in Columbia. It is reasonable to assume that DEA was interested only because it expected that Londono's activities would have

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impact in the United States. In addition, Londono's disclosure of the amount of money he was taking out of the country may have exposed him to liability under the Internal Revenue Laws. Further, even assuming the information sought was not directly inculpatory, it could have been used as a link in the chain of evidence utimately used against him. Cf. Garner v. United States, supra, 3098, n.17, n.18.

The requirement that a demanded response be "incriminatory" has not been construed strictly by the courts. The statements demanded, for example, need not be such as would themselves support a criminal conviction, and it is sufficent if they would furnish a link in the chain of circumstantial evidence necessary for conviction. Moreover, it is not necessary that the witness anticipate that the responses themselves be used as evidence even in this limited fashion. It is enough if the responses would provide a lead to a source of evidence which might be used. This attitude, of course, is consistent with the proposition that the answer need only have a tendency to incriminate. MCcormick, Evidence (2d. Ed. 1972) at 292

See Blau v. United States, 340 U.S. 159,161 (1950); Malloy v. Hogan, 378 U.S. 1,14 (1964)

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CONCLUSION

Londono properly had a Fifth Amendment privilege to assert with respect to the oral questions put to him by Customs agents.

Respectfully submitted,

Ivan S. Fisher Attorney for Henry Gomez Londono 410 Park Avenue New York, New York 10022

(212) 355-2380

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

U.S.A.,

Plaintiff, :

-against- : 76 CR 153

HENRY GOMEZ LONDONO,

Defendant. :

November 8, 1976 225 Cadman Plaza East Brooklyn, New York 4:30 o'clock P.M.

Before:

HONORABLE JOHN F. DOOLING, JR.,

U.S.D.C.J.

Paul Goldwert, C.S.R. Acting Official Court Reporter

Appearances:

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DAVID G. TRAGER, ESQ.,

United States Attorney. BY: JEFFREY KAY, ESQ., AUSA

IVAN STEPHEN FISHER, ESQ., Attorney for Defendant, 410 Park Avenue, New York, New York, 10022.

THE COURT: I guess you should start first, Mr. Fisher.

MR. FISHER: If your Honor please, this is a motion to suppress statements obtained as a result of the unlawful arrest and interrogation of Henry Gomez Londono on or about February 22, 1976, at the JFK International Airport, particularly the Avianca area.

In addition, part of the stipulation entered into which forms the basis upon which these motions are brought shall constitute the facts upon which a trial of the defendant on the charges contained in the indictment will be had. The defendant already waived, with the consent of the Government, his right to trial by jury.

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Your Honor, almost as an addendum, I am in receipt of a letter dated November 5, 1976 from the Government in regard to this case, in which our attention is invited to United States against Core, a Second Circuit Slip Opinion number 5904.

Your Honor, to very, very briefly respond to that, we believe Core is absolutely inapposite and irrelevant to the issues before the Court. We do not here claim nor do we ever that any relief that we seek is hinged upon a basis that our answers to any of the questions were unresponsive. That is the thrust of Core. But, instead, I think I should invite this Court's attention and indeed the Government's to a development that has occurred since the filing of all papers and which may affect the Court's consideration, although perhaps even negatively to our position. I nevertheless am obliged to point out to the Court that the Supreme Court one week ago remanded United States against Jacobs, a case which we relate in our memorandum for reconsideration in light of the Supreme Court's decision in Manduhano, the case in which the Supreme Court rejected the thrust that a witness

before a Grand Jury should be given the Miranda warnings.

The stinging decision from Justice Brennan sets out our position more eloquently than I hope to expound. I would point out that the Supreme Court's action in no way decides the issues that the Second Circuit purported to resolve under its supervisory powers in United States against Jacobs, and it was only to that extent that we relied on Jacobs. I do not think that I have anything more to say about the remand than that.

If I may, I would like to get to the positive aspects of our application.

Your Honor, I think it clear from the stipulated state of facts that on or about February 21, 1976, agents of the United States Government, particularly, Customs and DEA officials were apprised of a set of very, very exciting circumstances. They were told someone who had been claimed to be a narcotics violator in Columbia was about to leave our country with somewhere around \$100,000 in cash. This, of course, was a very exciting piece of information and I think it was as a result of the agents'

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frustration at the simple, clear non-violation of any law, that their countenance in this fact led us to the issues that are before this Court.

In substance, as I have understood the function, the proper function of law enforcement agents and, indeed, the function of the courts in supervising their conduct has been to assure that agents do not go out and make crime. The fact of the matter is that is precisely what the agents attempted to do here against their frustration of finding no crime to have existed upon their discovery of Mr. Londono.

Notwithstanding the efforts of the agents, as our memorandum points out, no crime was committed. The defense occurs when Mr. Londono is accosted by two Customs Agents.

THE COURT: Is everybody agreed that at the moment when they invited him to stop, no crime had been committed?

MR. FISHER: , That is our position.

MR. KAY: That is correct, your Honor.

THE COURT: Either the commission of the crime, entrapment or the violation of the Fifth Amendment or all of them.

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MR. PISHER: That is correct. I want to make it clear that there was no actual entrapment not-withstanding the attempt of the agents because our position is there was no crime committed at any point prior to the arrest of the defendant.

So they approached Mr. Londono and they obtained an interpreter. That is person number three. Then two more people at the request of Agents Nunziato and Sealey, all wearing uniforms, Port Authority Policemen together with a uniformed Customs Inspector, bringing the total number of people participating in this interrogation to six.

characterization in our papers that the defendant was surrounded. The Government has admitted in its stipulation that six people were in the immediate area of the interrogation, and on the way over here, for the first time it occurred to me that there may well be a distinction we ought to talk about between custodial interrogation, as even the Manduhano decision would analyze it, and arrest. There may be a distinction between what amounts to an arrest and what amounts to a custodial interrogation.

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An arrest may mean guns pointed, the intent to take someone away. A custodial interrogation, I submit, means no more than what happened here; the surrounding of a person, people wearing uniforms acting under the authority of the United States Government, demanding answers.

I submit, your Honor, that is custodial enough for the purposes of the application of Miranda. We invited the Court's attention to Judge Bowman's decision in Gonzalez only to suggest that there is no normal incantation or recitation required. It is the plain meaning of the view of things.

What happened was this man was on his way out to Avianca to depart this country. He is precluded from doing so. He is literally shrouded by the corporeal presence of three uniformed policemen and three others. I submit, your Honor, that was custody enough.

In addition to that physical circumstance, no effort was made by the interrogator to issure the defendant this was nothing other than an arrest or a very explicit form of custodial interrogation. No one said this is just to

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determine whether or not you complied with a recently enacted rule of law.

THE COURT: Which they drew his attention to.

MR. FISHER: Subsequently.

THE COURT: Wait a minute. What it says is when they all approached him, then it says in 8: "Mr. Londono was advised of the provisions of Title 31, Section 11, 101(b)," and he was then asked -- have you got it handy?

MR. FISHER: I have a copy of the transcript, your Honor.

THE COURT: I was looking at the typewritten one. It says he was then asked after being told about the existence of the statute, and then paragraph 9 says he was again asked. That is where he told them about the envelope, the contents of which he did not know.

MR. FISHER: There is no dispute about that. When the Supreme Court wrote Miranda, and its amazing survival since, I think what they had in mind was protection to the uneducated, particularly, a person who does not speak the language of this country, who is generally unfamiliar with the workings of an intricate legal system, and the

unfair use law enforcement people attain as a result of the pressure they impose upon an interrogational setting. These are the things Miranda is addressed to.

Those are the things that, in fact, occurred and led to the answers that became the whole corpus of this case. They did not say to him, "Listen, all we want to know is if you have got more than \$5000. By the way, you are not under arrest. You are not being taken anywhere. This is just an administrative review. Customs people are supposed to ask this of everyone," or something to that effect.

They did not tell him, "You don't have to answer any questions." They did not tell him any of those things that might have assured Mr. Londono this was nothing other than a compulsory process that was going on.

THE COURT: Hadn't he already committed his baggage to the aircraft?

MR. FISHER: Yes.

THE COURT: Hadn't he presented his ticket for transport?

MR. PISHER: I don't think so, no. As a

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matter of fact, that had not occurred.

THE COURT: I do not see how he could have got his bags onto the plane without checking himself in as a passenger.

MR. FISHER: There is a curb side check-in.

When you come up, you show them the ticket -- this
is my experience. It is not covered by the
stipulation.

MR. KAY: I was physically there. If I can explain it to you, if Mr. Fisher will let me.

what happened is when you pull up, as soon as you go through the door, you immediately give your luggage in. They then give you your voucher for your baggage. They tell you which gate to go to. You then leave that area and walk down a hallway to the actual area where the plane is parked.

THE COURT: The boarding gate?

MR. KAY: Yes. As you walk towards the boarding gate, you clear preflight security at the airport. You pass the Customs area. There you continue on to the gate where this Avianca plane was waiting.

When Mr. Londono was stopped, he had passed

the security gate, had passed the Customs gate
and was enroute now to the actual departure gate
where the ticket coupon would be lifted as he was
to board the plane. That is the physical set-up
there at the time regarding where the plane was
located.

THE COURT: They did not wait until his ticket was lifted?

MR. KAY: The actual ticket coupon, no.

THE COURT: Maybe you ought to stipulate to that fact.

MR. FISHER: I would stipulate to the remarks of the Assistant United States Attorney and agree to include them in the record before the Court.

The fact remains that we are dealing with what is, unfortunately, a crude statute.

THE COURT: You did not know it existed, did you?

MR. FISHER: Yes. I had personal knowledge because during one flight I took, I remember finding a Customs officer on my way into the actual plane asking everybody if they had more than \$5000. Being a lawyer, I asked what business it was of his, and then I learned of it.

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THE COURT: He did not tell you he was interested in behalf of a charity.

MR. FISHER: He told me Congress authorized him to make that inquiry. I should point out I was able to answer no.

The fact remains, your Honor, 1101(b) of Title 31 is awfully imprecise, especially in view of the realities of airports. When does someone depart?

In Singleton, a case upon which it seems
both of us relied, Customs agents did the appropriate
thing, I think. There Mr. Singleton, inches from
the porthole of the airplane, is found to be in
possession of an enormous sum of cash. The
Customs agents instead of going through this
rigmarole as was gone through here, designed for
only one person which is to manufacture the charges,
instead of that, they handed Mr. Singleton the
Customs form and asked him to fill it out.

THE COURT: There is a form established?

MR. FISHER: Yes.

THE COURT: Under the regulations?

MR. FISHER: Yes. None was ever furnished to Mr. Londono in this case. There was no attempt

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to provide that to him.

THE COURT: Is that stipulated?

MR. FISHER: I would agree to introduce as an exhibit in this case a document entitled, "Report of International Transportation of Currency or Monetary Instruments Form 4790." I ask that it be marked and we would stipulate to its introduction and that that is the form customarily used by Customs.

THE COURT: And it was not presented

Mr. Londono at the time of the interrogation.

MR. KAY: We will stipulate to that.

MR. FISHER: So stipulated.

Getting back to the threshold questions, certainly, if Miranda does apply, certainly if no Miranda warnings were given, and that has been agreed to, nothing further be said, although there is a lot more I wish to say alternatively.

One of the set of circumstances I would like
to draw your attention to is that they went there
in possession of a very specific set of information,
your Honor. They were not in a regulatory
enforcement procedure there. They went to get
Henry Gomez Londono because of very specific

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information that had been forwarded to them.

They were looking for this man. They were hoping beyond all hopes that they could get him to deny the possession of \$5000 or more dollars.

I remember when we first started dealing with these issues in law school, that there was a very important cleavage between investigatory and accusatorial stages in an investigation. It was the kind of groaning at that very important distinction in an adversarial non-inquisitorial system that I think Miranda and the cases of that sort came about. That distinction applies here.

This was not really investigatorial. It was very, very accusatorial. They were there for that purpose, your Honor, and the stipulated facts, I think, literally scream it out.

Given those circumstances, they were there
to get Henry Gomez Londono in one way or another.
Given the circumstances that they immediately
summoned for the uniformed policemen to shroud
the defendant and given the fact that they advised
him not at all of any right whatever, I think
Miranda must be found to have been violated.

Even if it were not, even if somehow the

defendant was not in custody and Miranad does not apply, I think the rationale in United States against Estelle Jacobs is pertinent here. There is something that suggests something less than the standard of law enforcement activity that I think this Court should count under its supervisory powers.

In Jacobs, the Court was concerned with a standard practice, the practice of subpoening people before a Grand Jury and asking the witness questions, the Government full well knowing the answers because they were repeating statements that had been intercepted on tapes. Again and again the courts have been unhappy about it but it has gone without judicial sanction. Finally, the Second Circuit in Jacobs said there is something unfair because of one thing. You did not tell Mrs. Jacobs she was the target of a criminal investigation.

No one told anything of the sort to Mr. Londono. They did not tell him he had a right not to say anything. I am not suggesting here, in the alternative, that every single right we are familiar with under Miranda had to be communicated;

perhaps not the right to an attorney; perhaps not the right to have an attorney appointed or paid for by the Government, but he had to have been told, your Honor, particularly if the Government's view of 1001 is correct, what could Londono say that would not land him in the klink.

THE COURT: All he had to do was tell the truth.

MR. FISHER: That would have been incriminating information.

THE COURT: How?

MR. FISHER: In the context of the information that had already been gleaned by the Government from the cooperating individual.

THE COURT: Not at all. They say to him

Section 1101 requires and he said, "I am so glad
you told me. As it happens, I have \$10,800 on
my person and, oh heavens, a lot more in my bags.

Where is the form and I will fill it out, and I
think my taxes are, current. I don't think you
need any jeopardy assessment but if so, let me
know."

No crime.

MR. FISHER: Your Honor, if Mr. Londono were

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before you in a courtroom --

THE COURT: It is the same as a perjury case.

MR. PISHER: He is called as a witness. Let's say this event had gone unnoticed and let's say there was no Title 31, 1101(b) and Mr. Kay, for whatever purpose, in connection with the criminal case pending against another was in possession of the information that the agents have from the informant in Columbia, and asked Mr. Londono, "Mr. Londono, were you in possession of approximately \$100,000 in cash on or about February 22, 1976?"

If I were representing Mr. Londono, I assure your Honor, I would have run up to that witness stand as fast as I could to advise him of his Fifth Amendment right.

THE COURT: You are allowed to be rich.

MR. FISHER: But frequently it is that wealth that leads to your undoing in a criminal narcotics trial.

THE COURT: You said he was a witness.

MR. FISHER: What about the next proceeding?

THE COURT: If the Government knows he is in possession of \$100,000, it knows it.

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MR. FISHER: Would you have found it improper to invoke the Fifth Amendment?

THE COURT: Certainly. He is a witness, not a party. To say to the man do you have \$100,000 or did you on such and such a date -

MR. FISHER: Could he have improperly invoked the Fifth Amendment privilege?

THE COURT: No, he could not, because it does not involve him in any criminal conduct at all.

MR. FISHER: Your Honor, that is a very important, probably potentially incriminating, corroborating piece of proof.

If I was about to meet Londono, if I was about to hand him heaven knows what and he was supposed to pay me \$100,000, and here we have Londono being forced to admit that he was in possession of \$100,000 at or about the time --

THE COURT: You are adding a great many more facts not before us.

MR. FISHER: I am working rationally within the information the Government claims to have received from its informer.

THE COURT: He said this man is planning to leave the country with a great deal of money for

the purpose of buying, I guess, narcotics in a country in which for all we know it is legal to buy -- I don't know whether it is. Is it?

MR. FISHER: Of course it is illegal.

THE COURT: In Columbia?

MR. FISHER: I think it is.

THE COURT: I imagine so, but that is not a crime against the laws of the United States. It is no crime unless they have been told they are going to buy it there with the intention of bringing it back to the United States for sale in the United States in a manner prohibited by law.

He can take the \$100,000 and go buy a ranch or an interest in a tin mine, whatever he wants.

MR. FISHER: I have represented more than a few defendants as to whom the only piece of corroboration independent of the averments of co-conspirators with their own axes to grind has been their possession of substantial sums of cash.

THE COURT: What you are asking me to do is assume the man is a criminal and that therefore his possession of \$100,000 is evidence of some criminal contact.

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MR. FISHER: Not at all. I am asking you to see that without any doubt he had indeed a valid Fifth Amendment claim. Remember, it is not protection designed only to protect the guilty or only to protect the innocent. It is designed to protect the compulsory incrimination of yourself.

This informer could be lying through his teeth. Mr. Londono could be as innocent as snow of these charges and still he would be a fool to admit the possession of the money no matter how innocent prior to trial or even during trial.

THE COURT: I am afraid I cannot agree on that.

MR. FISHER: Is your Honor's position, going back to the hypothetical I suggested, you would not permit Londono to claim a Fifth Amendment privilege?

THE COURT: If you are saying to me the man is under suspicion for some specific offense and his possession of the \$100,000 or whatever at the time and place referred to could be substantial evidence contributing to his conviction, of course the protection would have to be sustained.

MR. FISHER: The agents came up to him and told him they had to report \$5000. They are

very, very clever. They don't say, "Mr. Londono, you have not violated this law yet. It is still all right to file the report." They say something else. "You are required to report the taking away out of this country of \$5000 or more."

In his mind and objectively speaking, and I think the record also should reflect that on or about February 22, 1976, there were no signs anywhere with regard to this particular law or regulation.

THE COURT: It is entirely a question of what they said to him.

MR. FISHER: So he does not know whether or not he already violated it. He does not know if an admission now that he has more than \$5000 will either satisfy the duty imposed upon him by this legislation or, instead, incriminate him in what, in fact, has already occurred.

The fact that we are going to be in a minute discussing when it is you violate 1101(b) and in view of the duty left by this legislation and how he is supposed to know, now there is no way for him to know whether or not it's something he already violated or something he still has a

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chance to file on. They did not make that clear at all.

So perhaps my reaching out for the more, I thought, obvious hypothetical is unnecessary.

THE COURT: I think it is.

has the power to change his mind.

MR. FISHER: Strictly confined to what happened to this man with these agents on that day -THE COURT: Yes, because anyone with \$100,000

MR. FISHER: They did not tell him that either.

THE COURT: I am talking about him. In your subconscious you are assuming the whole of the story that they were told were certain to follow. No doubt he had that in mind but if you have got \$100,000 in your possession, you are free to change your plans, even if you did mean to purchase heroin for importation into this country or cocaine.

If you have \$100,000, you can change your mind. \$100,000 is a great deal of money in some South American countries, not all.

MR. FISHER: Everyone that I have been to, it is a fortune, your Honor.

THE COURT: You can buy yourself a very good

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ranch.

MR. FISHER: But that suggests to mind an analogy we have not made in the memorandum of law which may be apposite.

I recall the Second Circuit in United States against Bell and United States against Clark, when back in the airport and dealing with the highjacking and the bombing crisis we were confronted with, and dealing with the sensitive Fourth Amendment questions pointed out, and I think it was Clark in which it was shown that the Government's failure to advise passengers waiting on line to be searched, that they could avoid being searched by simply not flying. It wasn't too late. They could turn around and walk out. It was a factor to be considered against the validity of the holding of the search.

THE COURT: Did they stay with that? I think not.

MR. FISHER: They did.

THE COURT: I do not think so. There is one later case, at least, in which they in effect decline to say there was a duty to tell them that, that they could avoid the problem by leaving the

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airport. I cannot remember the name.

MR. FISHER: I will confess I am unfamiliar with that case and as I pointed out, it was not an area that we had prepared to argue to the Court.

Whether or not in the Fourth Amendment context
when we are talking about this tension that exists
between the Fifth Amendment right and the right
of the Government to inquire and investigate, I
think it is of telling significance that the
defendant was not advised.

The really significant thing, it seems to me, he should have been told, "Listen, you have not broken any laws yet. These people here with badges, all you have got to do is avoid the consequences by filling out that form." They didn't really tell him that. It was not made clear at all. They didn't tell him he didn't have to board the plane and, therefore, didn't have to make any declaration. They didn't tell him he could be silent, best of all. They didn't tell him any of those things.

We have two other, I think, fairly cogent arguments. They are these.

The thrust of the affidavit in support of the

wiolation of 1101(b) of Title 31 and there was a violation of Title 18, United States Code, Section 1001.

First, with regard to 1001, we confess that in the absence of a District Court opinion decided in the Southern District of New York in the fifties, United States against Davey, in the absence of that, there is no Second Circuit law squarely on point but every other decision out of every other Circuit is in our favor. I include the First Circuit in Chevour, Fifth Circuit in Bush, the D.C. Circuit but only a District Court opinion, the Fourth Circuit, Stark; Tenth District Court of Colorado, United States against Levin. Even McCue points out they do not overrule Davey. They just don't decide it.

what the Second Circuit failed to decide

is the so-called exculpatory no exception to the

ambit of 1001. We spend a good deal of time in

our memorandum tracing the history, genesis,

evolution of 1001 and I won't repeat it here.

I don't have any fresh insight on that, but the

conclusion I think seems to make sense. It would

investigating something within his ambit could laterally cause someone as to whom the investigation has focused as a target to answer truthfully at the risk of 1001, five years plus \$10,000 fine.

No court has ever made an interogee liable like that. We submit this Court should not as well.

That is one of the thrusts of the affidavit in support of the search warrant.

The other one is a violation of 1101(b) and the Government rightly points out there was a specific authority granted to Customs agents to obtain search warrants for the purpose of investigating violations of 1101(b).

The fact that the luggage was already onboard is in no way dispositive. There is no violation of putting money onboard a plane in luggage or otherwise. The violation occurs when and if you get on the plane, and I submit knowing of the need, the requirement —

THE COURT: 1058 says "willfully." I take it that is why they warned him, if they did.

MR. PISHER: We have stipulated they told him what the requirement was. They did not warn him.

They did not give him the form that has been admitted before your Honor.

What I am getting at, there is no way of knowing either from the regulations or the statute when one departs. In Singleton, obviously the defendant was further along the route to disembarcation than Mr. Londono. Singleton was inches from the porthole of the plane.

MR. KAY: You are misreading Singleton.

MR. FISHER: My recollection is after all of the immediate searches or regular searches, as he was about to get on the plane, they were frisking for weapons -- at that time they did this -- and that last time is before he got on the plane and generally it is a chute that you go down. One is searched for weapons and then you cannot go outside again. So what is the last thing that happens and they found these bulges and they take out the hundred dollar bills, lots of them. They give him a sheet of paper and he fills it out and he left.

They did not do that here. I do not think we can engraft, your Honor, an improvement upon the legislative work of our Congress here. I

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think they should have specified what they meant by "depart." I think it could easily be done. If they said don't get on an airplane carrying more than \$5000 without first filling out an appropriate form, we have no difficulty here. Indeed, Mr. Londono violated no law whatever.

so since the affidavit, your Honor, is based upon a violation of 1101(b) which did not, in fact, occurred, might not have, in fact, occurred and, in any event, if it would have, it didn't and since it is based on a construction of 1001 that has been repudiated by every Circuit Court that dealt with the question, the affidavit must fall.

Let me point out the affidavit recites not one denial. In the affidavit, Londono is not quoted as denying he had more than \$5000. I don't think he read Bronston but it seems as if he had. When they asked, "Do you have more than \$5000," he reached into his pocket and handed them \$900. Perhaps it is not the most illuminating answer but it is not false.

Then they ask him, "Do you have more than \$5000?" Then he takes out the envelope and the

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agents see it contains money. Again, not a lie, not a misstatement. Nothing untrue, your Honor.

The only suggestion of an untruthful statement contained in the four corners of the affidavit is the statement by Londono that when handing over the envelope, he denied knowing what its contents were. For the purposes of this argument, assuming that that statement was, in fact, untrue, and I will concede that an agent had a basis on which to believe that was untrue, certainly after he saw a substantial amount of money in it -- actually, only after he saw the money in it.

That is not the kind of misstatement that

falls within the ambit of 1001, your Honor, not

at all. That goes nowhere to the proper application

of 1001 which is to protect investigatorial

functions of federal officers from being diverted,

misdirected from their proper course causing

government expenses in that effort and the like.

It is not the kind of misstatement contemplated

by 1001.

For all of those reasons, I think 100% of the evidence in this case should be suppressed.

THE COURT: Mr. Kay, I guess you have a

different view.

MR. KAY: We have a slightly different view.

Number one, we do not agree with the statement that the government agents went there to make a crime. The fact is, they went there to see if a crime was going to occur. At the time that the agents went to the airport, Mr. Londono had not committed any crime. Possession of \$100,000 in United States currency is not a crime in this country.

At the time Mr. Londono got to the Pan American building, the fact that he had this money was not a crime. The fact that he checked it in, there was no crime committed. The crime here is the initial failure to file a form or to conform with the standards of the statute.

You take the Singleton case and it has to be distinguished because it is different from the set of circumstances when you read Singleton.

At the time Singleton went down at the BOAC terminal, that was at the early stages of the anti-highjacking procedures at JFK. Singleton was stopped on his way to the plane by Customs agents who had been detailed to provide services for the anti-highjacking

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screening.

What happened was Singleton was stopped. He was patted down. Currency was found. They gave Singleton the form. Different situation than what is here. I do not think they are applicable situations.

Customs agents went to the airport on

February 22, 1976 looking to see what was going to
happen. When they approached Londono, Londono
was told the provisions of the statute. There is
a Spanish employee who is the interpreter. He
told him he understood the statute and what was
required. The Government concedes there was no
sign at the airport apprising anyone of the
statute at that time.

Londono was asked if he had more than \$5000 in U.S. currency, to which he replied no. Then he shows them the \$900 and then shows the envelope to the agents. We would submit that is an unresponsive and false statement regarding the functions of the United States Customs and enforcement of the law.

We did not know what his answer was going to be. If Londono said, "Yes, I have more than \$5000 --

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I did not know," and showed it to the agents or told the agents he was exporting more than \$5000, no crime would have been committed. So, I believe, your Honor, had he told the agents he was taking out more than \$5000, there is no way they could have legitimately arrested him. Any arrest would have been completely illegal.

I do not think if the Customs agents called an Assistant United States Attorney prior to their going out there, any attorney would have authorized the arrest because no crime had been committed.

It was a situation that was going to happen there and then. They put him on notice. They gave him an opportunity. He understood what the statute was. There was a Spanish speaking interpreter. He knew what was going on.

I do not agree with Mr. Fisher that he had

a Fifth Amendment right in this type of situation.

I think the case law on this point in these
situations state that it is an iffy question;
that he did not have a Fifth Arandment right to
say I don't want to answer. I do not think if
under the circumstances he said that I am
transporting more than \$5000 out and I have \$57,000

or \$47,000, anything more could have happened to him. They would have given him the form and he would have gotten on the plass and he would have taken the money out of the country. I do not think there is any Fifth Amendment right here.

We feel that the 1001 violation was the false statement made to the Customs agent. We think it was unresponsive and false, as the Second Circuit says. It was a false answer and he does not have the right to give false answers.

Under the circumstances, I do not think it
was a custodial interrogation. When Mr. Londono
was stopped, he was stopped by two plainclothes
Customs agents who identified themselves. A
Customs Inspector was brought over in uniform.
A Pan Am employee was brought over because they
realized that Mr. Londono only spoke Spanish.
There was dialogue through the interpreter.

We feel the affidavit to the search warrant is sufficient based on the false statement. One thing Mr. Pisher left out is the probable cause bolstered by what the informant told us. In addition, what happened at the airport and the incident with the \$10,000 in the envelope bolsters

the affidavit to the search warrant.

Concerning Miranda, the way we interpret the cases on the border searches of people coming in and the few cases that there are --

THE COURT: Are there any on outbound people?

MR. KAY: No. The only case that comes close
is United States versus Mardy which Judge Weinstein
had. That is only a reported opinion on the motion.

They did not really even consider Miranda.

They considered the export question on the Export

Control Act. I do not think at the time that he

was stopped, it wa. I custodial interrogation.

They had a reasonable suspicion to stop him. I

do not think at that point the Miranda rights were

required because although he was maybe in focus,

this is more of a test than a focus. He was not

a target. No crime had been committed yet.

THE COURT: I suppose isn't there a basic question of fairness though, whatever that means?

MR. KAY: By putting him on notice and giving him notice of what the statute required.

THE COURT: If they said to him, "We understand you are taking a very large amount of money out of the country, are you? If so, you must sign a

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declaration form stating how much you are taking out." Instead of that, they told him about the law and said, "Have you got it on you?"

MR. KAY: They just asked if he had more than \$5000 on him that he was taking out of the country. He replied, "No, I have \$900." Then the incident with the envelope with the \$10,000. He was put on notice at least twice.

THE COURT: That was two crimes right away, if you are right, the minute he answered the question.

MR. KAY: Yes, your Honor. I think also with the other opinion that if he had turned around, no crime had been committed, I have problems with that. If the baggage had gone on and the plane departed, the way we interpret the statute, he still caused the transport of money in foreign commerce.

The question of whether he turned around or not, we will never know, unless he came back and got his baggage off the plane and left the airport.

THE COURT: I guess he could have if he had not surrendered his transportation ticket.

MR. KAY: The other problem is it is a quarter

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to six, Sunday evening and the plane is leaving 6:05. The immediacy of the situation requires that some action be taken.

THE COURT: I take it that the departure of the plane was held up to get the baggage off?

MR. KAY: Yes. There was some commotion about that, too. We have to put ourselves in the agents' shoes at that point as to what action they are going to take and what is going to be done.

Under the circumstances, what the agents did
was reasonable and I do not think they overburdened
or trampled any of Mr. Londono's rights as far
as the way they handled it. I do not think they
could have done much more.

a witness on the stand and telling him after he is under oath that you must realize you are testifying under the pains and penalties of prosecution for perjury if you answer falsely, and you ask a question and he answers falsely.

It is nonetheless a crime but it is done under judicial supervision.

It is the United States Attorney that asks

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the question. He cannot say if you had not asked the question, I would not have committed the crime. You did ask the question.

Does this case lend itself to an analysis that simple?

MR. KAY: I do not know how to answer. I think it is a tough situation. I think the agents presented him with the law. He stated he understood. If he had said, "Yes, I have more than \$5000," one must assume under the circumstances he would have been given the opportunity to declare more than \$5000 and be allowed to leave the country.

THE COURT: I kind of suppose the statute which deals with taking out more than \$5000 more or less assumes it is dealing with people who are worldly-wise. There are not too many naives who have more than \$5000.

MR. KAY: When you look at the history of
the statute, the way it was applied in this case,
it has the intent of trying to slow down people
taking money out of the country. The enforcement
in the way it was handled here follows that intent.

I agree the statute is crude in certain areas

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and the way it was handled here, I think, befits what had been done under the circumstances. Surely, we would not have him leave the country and once he is in Columbia go and indict him. They have to take action.

THE COURT: One thing I am worried about. Section 1001 says: "Whoever knowingly transports or causes to be transported monetary instruments from any place inside the United States to or through any place outside the United States in an amount exceeding \$5000 on any one occasion shall file a report and the report required shall be filed at such times and places as the Secretary requires," and then he requires it to be filed, under the regulation, before departure.

MR. KAY: If I refer you to the form, the form indicates a traveller in possession of the money, whether he be the principal or the agent, at the time he is leaving the country must declare it at that point in time.

MR. FISHER: The form was never given to the defendant.

MR. KAY: I am answering the Judge's question. It is distinguished from the fact that if I am in

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my home, I can put a package in the mail. The traveller in possession has to fill out the form at that point in time.

THE COURT: I guess what I am worried about is much more physical; that is, whether he still has not departed the country, neither has the money. Where does 1101 head in?

MR. KAY: I think we have to go to 1101,
Subdivision 2(b) to get our answer for that.

"For the purpose of this section, monetary
instruments transported by mail by any common
carrier or any messenger or bailee are in the
process of transportation from the time they are
delivered into the possession of the Postal Service,
common carrier, messenger, bailee until the time
they are delivered in the possession of the addressee."

In other words, they are in the process of transportation once he gave the baggage to the airline people.

MR. FISHER: 1102 is the forfeiture section.

Furthermore, the sections promulgated under 1101

make it clear when we are talking about a situation

with a traveller. Then the violation occurs if

and when the traveller departs. It does not matter

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where the bags are or what stage of processing they are in.

THE COURT: That still would not explain 1001.

MR. PISHER: Right.

MR. KAY: What happens if he does not get on the plane and the bag goes?

MR. FISHER: That is the question.

MR. KAY: He causes to be transported.

THE COURT: I think that would be the case.

MR. FISHER: They could forfeit it but that is not a crime.

THE COURT: Except as provided in Subsection c,
"Whoever knowingly causes to be transported
monetary instruments in an amount...shall file
a report."

I see what you mean. If he never departs; in other words, the statute would seem not to cover a freight shipment of money.

MR. FISHER: That is one of the problems, especially when you read the regulations. I was looking for my copy of the regulation.

MR. KAY: One says "knowingly transports or causes to be transported."

THE COURT: You are dealing with a failure

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of money. That is not forbidden. The reports required to be filled by 10.23(a), which is the applicable one, "shall be filed at the time of departure, mailing or shipping from the United States unless otherwise directed." That is at the bottom of page 135, second column.

MR. KAY: The form says, "Travellers at the time of entry into the United States or at the time of departure from the United States with Customs officer in charge shall file."

THE COURT: The regulation goes a little further. That says "or mailing or shipping."

MR. KAY: I think the question is though we do not have a mailing and we do not know if he was shipping, I would think the fact that he had an airline ticket indicates he was about to leave the country with the money in the bags.

THE COURT: What I am bothered about, I do not know the full background of the statute, whether it is a currency control statute or criminal statute.

If it is a currency control statute, they are more interested in whether the money leaves

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than anything else and in its broadest sense, what you have here is in a certain sense is at most an attempt to export currency in a very large quantity which was defeated at the border. It was defeated by reason of information received in advance of the departure.

The question is what is the criminal consequence, if any, of the frustrated attempt to export currency without a report.

MR. KAY: I think our position would be he is in the act of departure.

THE COURT: It is a failure to file a report when the report is not due yet because he has not departed and the money is still here.

MR. FISHER: There is Section 1105 which authorizes the right to get a search warrant and sheds light on the question put by Mr. Kay. If the Secretary has reason to believe that monetary instruments are in the process of transportation and the report required under 1101 has not been filed, he may apply to any court of competent jurisdiction for a search warrant.

MR. KAY: Had he said, "I have more than \$5000 and I am going to declare it."

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MR. FISHER: Also, the regulation 103.23(d), and I have your copy, suggests that only one report need be filed, which seems to contemplate the situation Mr. Londono is in. We have some money in the luggage and some on him. He was not required to file a report at the time of his arrest.

MR. KAY: He was required to file at the time of his departure.

all the man had to do was to do what law-abiding people do when somebody says to them are you this, are you that or the next thing; that is, to answer truthfully. In this case, had he done so, it would not have been any problem. They would have had to wait until he came back, if ever, or until the proceeds of the foreign purchases illegally made their appearance in this country.

He chose to tell them an untruth. That was
the gist of the offense. I think they had the
right to interrogate simply because they had
passed the statute. They don't have to warn you.

It seems to me that if you do not answer truthfully,
you will commit an offense.

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I suppose when they discuss filing income
tax returns, if they tell us that, I wonder
whether they may have to tell you that really in
such circumstances as this or hadn't they done
enough when they tell you that you must report.
Then you don't report.

I think what you say, Mr. Fisher, is you are really suggesting he has a defense of something approaching panic. He is frightened into lying.

He was asked a question in such circumstances and in such terms as to make him think that admitting that he had a great deal of money on him or in his bags would result in some dire consequence to him.

MR. FISHER: The circumstances of the interrogation were such that someone of his relative ignorance --

THE COURT: It comes down to did they say to him, "Are you taking more than \$5000 out of the country and you be ter say or you are in deep trouble."

MR. FISHER: The implication is he might have already violated that. After all, we are wondering here whether or not he violated a section of this

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law when he gave them his baggage.

THE COURT: We know he did less than he should have done when he told an untruth at the time when we would have told him had we been there he better tell the truth.

MR. FISHER: Shouldn't these officers try to avoid a violation of the law rather than help in its commission?

MR. KAY: They did.

MR. FISHER: No. Why didn't they say, "You have not violated the law. All you have to do is admit that you have it"?

THE COURT: What you are saying is they said these things to him in circumstances such as to suggest to him that he had already violated the law and he better start building his defenses.

MR. FISHER: Something like that.

THE COURT: And his first was, "No," except for the measly \$900.

MR. PISHER: And he takes out the envelope.

THE COURT: Because he perhaps realized a

search would ensue.

MR. FISHER: Why would be think that?

THE COURT: Because I think he might have

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already had the idea he already committed a crime and subject to arrest for trying to depart the country with concealed money.

MR. FISHER: If that is the case, the panoply Miranda warnings.

THE COURT: If the defendant thinks he is being accused where, in effect, he is being given an opportunity to avoid committing the crime, does that apply?

MR. FISHER: That is not what happened.

After they asked him, "Do you have more than \$5000," and he hands them \$900, they never offered him the form. Besides, I do not think it matters what the defendant thought. I think it is one of the factors we ought to consider.

MR. KAY: Case law says no, not what the subject thinks.

MR. FISHER: It is an objective test. That is what Miranda is all about. What is this custody situation? Does it have to be a closet? Not at all. It is the same thing when you have six or seven bodies being a wall around you. What is the difference? There is none.

THE COURT: Except there is nothing in the

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eircumstances calculated to elicit an untruthful answer. That is his choice. It is a coercion to answer, not a coercion to lie, if any coercion there is.

MR. FISHER: Before they ask him a question, they literally shrouded him.

THE COURT: What should his answer have been?

MR. FISHER: His response should have been,

"Yes, I have more than \$5000." I am the first
to admit it.

obvious that, as you say, if he felt he was under arrest or practically under arrest, there was no escape for him. That is the only set thing that common sense could possibly have suggested to him; I better make a clean breast of it before somebody beats my head in.

MR. FISHER: Everybody I represent, I tell them no matter how innocent they are, save it for the Court and say nothing. They didn't tell him go do that. They didn't tell him that at all.

THE COURT: Because they could not tell him that. The only thing they could say to him is we have a right to ask this question and we must

tell you you must answer it truthfully or your failure to answer truthfully will be a violation of law.

MR. KAY: There is no Fifth Amendment to the question.

MR. FISHER: They did not say that, first of all. Secondly, I disagree with you most respectfully, your Honor. He did have a Fifth Amendment claim. He had a very substantial Fifth Amendment claim when asked that question, and I respectfully differ with your Honor.

I believe the Appellate Court would agree.

He did not have to answer. He did not have to get
on the plane but they did not tell him that either.

THE COURT: Now we are going in circles. I think I understand your arguments.

Decision reserved.

MR. FISHER: Could I have two days to submit a memo on whether or not he could have exercised his Fifth Amendment claim?

THE COURT: Yes.

MR. FISHER: Thank you.

MR. KAY: Could we have an opportunity to respond?

THE COURT: If you find he has really scared you, yes.

(Time noted 5:40 p.m.)

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UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

76 CR 153 MEMORANDUM

and ORDER

HENRY GOMEZ-LONDONO,

Defendant.

erendant.

Appearances:

JEFFREY H. KAY, Esq. (DAVID G. TRAGER, Esq. United States Attorney, of Counsel) for the Government

IVAN STEPHEN FISHER, Esq. (JEFFREY D. ULLMAN, Esq. of Counsel) for defendant

DOOLING, D.J.

Defendant was indicted on three counts: first,

for having knowingly and wilfully made a materially false,

fraudulent and fictitious declaration to Agents of the Customs

Service, with respect to the amount of money that he was

carrying on his person and in his luggage when he was pre
paring to board Avianca Airlines Flight No. 53 on February

22, 1976; second for wilfully transporting and causing to be

transported via Avianca Flight No. 53 from John F. Kennedy

International Airlort (JFK) to Colombia, South America,

\$44,780. in United States currency having failed to file a

report on Form 4790 as required by 31 U.S.C. 11016) and 31 C.F.R. §§ 103.23(a) and Section 103.25(b); and, third, for knowingly delivering to Avianca Flight No. 53 two 38 caliber firearms, and ammunition, for concealed transportation to Colombia, South America to persons other than licensed importers, manufacturers, dealers or collectors without written notice to Avianca that the firearms and ammunition were being transported and without turning the firearms over to the pilot, conductor or operator of Avianca Flight 53.

The facts are few, simple and have been completely stipulated both for the purposes of defendant's motion to suppress the evidence involved and to dismiss the several counts of the indictment, and for the determination of the issue of guilt, if the motions are not granted.

On February 21, 1976, Drug Enforcement Administration agents told the United States Customs Agents that a reliable DEA informant had advised that a Henry Gomez-Londono would leave the New York area for Colombia, South America, during the period February 21, 1976, through February 25, 1976, taking with him \$100,000 in United States currency to complete a narcotics transaction. The informant described Gomez-Londono as a man born October 12, 1950, and having

brown hair, brown eyes, thick lips, broad nose, a square hairline, and a Colombian passport, No. 53 5124.

The Customs Agents accordingly established a surveillance at Pan American World Airlines Terminal at JFK at the Avianca Airlines departure area. Nothing came of the surveillance on that day. On the next day, February 22, 1976, the Customs Agents again established a surveillance at the Pan American Terminal at JFK at the Avianca Airlines departure area. On that day an airline employee told the Customs Agents that a Henry Gomez-Londono was presently in the Avianca Airlines area. The Agents, after observing Londono, concluded that he was the man described by the DEA informer.

As Gomez-Londono walked toward the Avianca Airlines departure area, two plain-clothes Customs Agents stopped him.

Gomez-Londono had already surrendered his luggage to be checked on to the flight and had received his baggage checks. However, he had not yet checked himself in as a passenger, and he had not surrendered the coupon covering the trip from New York to Colombia. That coupon would not have been "lifted" until he reached the desk at the departure gate for Avianca Flight 53.

After Gomez-Londono was stopped, a uniformed Customs
Inspector, Robert Como, was brought over; he identified himself to Londono and also identified the plain-clothes Customs
Agents to Gomez-Londono as Agents Healey and Annunziata. A
Pan American employee acted as a Spanish interpreter at this
point. In addition to the three Customs Agents and the Pan
American interpreter there were in the group near Gomez-Londono
another Pan American employee and two Port of New York
Authority Police officers. None of the latter three persons
participated in questioning or in arresting Gomez-Londono.
The two police officers were those regularly assigned to the
Pan American Terminal to observe departing passengers.

Upon being stopped, Gomez-Londono was advised of the provisions of 31 U.S.C. 1101(b), that is, that he was required to make a report declaring any money he was taking out of the country in excess of \$5,000. He was then asked if he was taking out more than \$5,000 in currency. He was asked a second time whether he had more than \$5,000 and Gomez-Londono then told the Customs Agents that he had \$900 in currency, and he took from his pockets and exhibited \$900 in currency to the Customs Agents. After he was asked for a third time

if he had more than \$5,000, Gomez-Londono took an envelope from his jacket pocket and handed it to the Customs Agents saying that he did not know what was inside the envelope. The Customs Agents observed something green through an opening in the bulging envelope, and they opened the envelope and found that it contained \$10,000 in \$100 Federal Reserve notes together with a photograph of Londono. Gomez-Londono told the Customs Agents that he had been given the envelope to deliver to Bogota, Colonbia.

At that point Gomez-Londono was told that he was in custody. His airline ticket, passport and baggage claim tickets were taken from him. The luggage had already gone aboard the aircraft, but it was removed before the aircraft left the United States, and it was taken to the International Arrival Building along with Gomez-Londono. Only at this point was Londono advised - in Spanish - of his Constitutional rights, and he was then interviewed. Thereafter he was taken to the City office of the Castoms Service for fingerprinting, and he was lodged at the Metropolitan Correction Center overnight. On the following morning Gomez-Londono was arraigned before the United States Magistrate.

On the next following day, February 24, one of the

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Special Agents of the Customs Service applied to the United States Magistrate for a search warrant. The affidavit recited the facts substantially as set forth above. An added paragraph stated that a DEA Agent had advised the affiant that the Special Agent in Charge of the DEA Bogota, Colombia, office had advised the Special Agent in Charge, by telephone from Colombia, that the original informant had furnished highly reliable information in the past, but that for security reasons no further information could be supplied. The warrant sought the right to search the luggage (valise and parcels) covered by Gomez-Londono's claim checks. The warrant was executed and \$44,780 in United States currency was found concealed inside various items included with the valise and cartons that Gomez-Londono had checked onto the aircraft.

The statute involved in the second Count of the indictment is 31 U.S.C. § 1101; it requires reports of exports of monetary instruments. 31 U.S.C. § 1058 makes wilful violation of Section 1101 a misdemeanor. Both Sections are part of the Currency and Foreign Transactions Reporting Act of October 26, 1970. The avowed purpose of the Act (Section 1051) is to require certain reports or records where such reports or records have a high degree of usefulness in criminal, tax or regulatory investigations or proceedings. The

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regulations of the Secretary of Treasury (authorized by Section 1053) give the generalized requirements of the Act precision of application. As the Supreme Court noted in California Bankers Assn. v. Shultz, 1974, 416 U.S. 21, 26,

"... the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone."

exceptions) that whoever knowingly transports, or causes to be transported, monetary instruments: from any place in the United States to any place outside it in an amount exceeding \$5,000 on any one occasion shall file a report. The reports required are to be filed at such times and places, are to be in such form and detail as the Secretary requires, and may be required to contain the amounts and the types of monetary instruments transported. A printed form, Form 4790, has been established by the Treasury Department which is headed "Report of International Transportation of Currency or Monetary Instruments." It requires a good deal of personal detail as to passport, etc., and requires a detailed statement of the coins, currency, and instruments being transported.

The statute itself does not prescribe the time and place for filing the reports. However, 31 CFR § 103.23 that provides/each person who physically transports currency in excess of \$5,000 on any one occasion from the United States to a place outside it must make a report. Section 103.25 of 31 CFR § 103.25 provides, further:

"Reports required to be filed by § 103.23(a) shall be filed at the time of ... departure, mailing or shipping from the United States, unless otherwise directed or permitted by the Commissioner of Customs. They shall be filed with the Customs Officer in charge at any Customs port of entry or departure, or as otherwise permitted or directed by the Commissioner of Customs. If the currency or other monetary instruments with respect to which a report is required do not accompany a person ... departing from the United States, such reports may be filed by mail on or before the date of ... departure, mailing or shipping, with the Commissioner of Customs They shall be on forms to be prescribed by the Secretary and all information called for in such forms shall be furnished."

When the plain-clothes Customs Agents approached

Gomez-Londono at the airport, they did not tender to him a
neither

Form 4790. It is / stipulated nor asserted that the

Customs Agents explained to Gomez-Londono that - disregarding

any possible illicit source of the money - neither his possession of the money nor his exporting it was forbidden by law, and that he was free to leave with whatever money he had so long as he made a report on Form 4790. He was not given any Miranda advice; no offense had been committed and no agent of government at that time had reasonable ground for believing that Gomez-Londono had committed any offense for which he could have been arrested. Whether there would be an offense depended on what Londono said and did after the agents stopped him.

In connection with the discussion of the applicability of Miranda v. Arizona, 1966, 384 U.S. 436, counsel have discussed the question of arrest and custody. Gomez-Londono was plainly not under arrest. It is not possible to say on the facts that he would or could have been restrained of his liberty if he had declined to speak, had withdrawn from his projected trip, or had made a correct declaration of the currency which was on his person and in his luggage.

Gomez-Londono was menaced by numbers, no doubt.

That may have affected his willingness to speak, an effect similar to that produced upon willingness of utterance in Miranda circumstances. But the case is one not of the

vestigation and at the point of accusation. It is a non-custodial interrogation, but that is not the end of the issue. The Court has said (Beckwith v. United States, 1976, 96 Sup.Ct. 1612, 1617):

"We recognize, of course, that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where the behaviour of ... law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely selfdetermined Rogers v. Richmond, 365 U.S. 534, 544 (1961). When such a claim is raised, it is the duty of an appellate court ... 'to examine the entire record and make an independent determination of the ultimate issue of voluntariness.' Proof that some kind of warnings were given or that none were given would be relevant evidence only on the issue of whether the questioning was in fact coercive."

The question is the due process question of fairness, but it suggests as a parallel the fairness question that underlies the right to complain of interrogation directed to eliciting self-accusatory admissions. The approach that seeks to elicit words that are then charged as a crime must surely, as in the case of custodial interrogation, be manifestly fair.

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It is, generally speaking, plain enough that (as the Court put it in <u>Bryson v. United States</u>, 1969, 396 U.S. 64, 72)

"Our legal system provides methods for challenging Government's right to ask questions - lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and wilfully answer with a falsehood."

(Footnote numberal omitted.)

And in <u>Bryson</u> the Court sustained a conviction for the filing with a Government agency of a false affidavit under a statute of questionable validity, holding that, even had the claim of invalidity been sustained, it would not have excused the filing of the false affidavit. (The charge in <u>Bryson</u> was under 18 U.S.C. § 1001.)

No such legal dilemma was presented to Gomez-Londono by the question put to him. A truthful answer would have exposed him to nothing except the obligation to fill out a form 4790 correctly. He would then have been free to leave the country with the money.

It has been suggested that merely to ask a man whether he had more than \$5,000 in his possession required him to furnish in answer information which, added to other facts, might have made out some criminal responsibility

on his part, that he should have been given the Miranda warning because an admission that he possessed so much money, or was taking it to Colombia, could implicate him in criminal charges. The argument must be rejected. No facts are referred to and none can readily be conjectured which could support the contention. United States v. Mandujano, 1976, 96 Sup.Ct. 1768, 1776-1777, echoing Bryson is clear that where there is a duty to answer, there is no privilege to lie, and, in the present case, there was an unqualified duty to answer a fairly put inquiry and a duty to answer it truthfully. See United States v. Chevoor, 1st Cir. 1975, 526 F.2d 178, 182, 185.

The questions that remain, however, turn around the sufficiency of the Second Count and whether the First Count is fairly within the principle of the cases just referred to in the special circumstances of the interrogation in this case.

It is difficult to see on what basis it can be claimed that there was here a violation of Section 1101(b) of the Act. Count Two does allege that Gomez-Londono wilfully transported or caused to be transported \$44,780 of United States Currency to Colombia without first filing a report.

But that allegation is not intended to indicate that in fact

any money ever left this country for, treating the stipulated facts as equivalent to a response to a request for particulars (a stage cut through in the present case), it is clear that the Government's position, and what Count Two charges, is that Gomez-Londono had done enough in committing the luggage to International transport by Avianca to become guilty of a violation of Section 1101(b) when, before he had himself boarded the plane or indeed surrendered his passage coupon, he made a false statement to the inquiring Customs Agents about how much money he intended to take abroad. But Londono's duty to have filed the report accrued under 31 CFR § 103.25(b) not earlier than "the time of departure." Gomez-Londono never departed the United States, or was the money ever transported from the United States. Gomez-Londono is not charged with an attempt to violate Section 1101(b) within the meaning of Section 1058, nor does the statute punish attempts. His acts at most constituted a frustrated attempt. Cf. United States v. San Juan, 2d Cir. 1976, Sept. Term 1976 Slip Opinions, p.471.

It may be suggested that the statute would be defeated of its purpose if liability did not attach until the moment of departure. That does not appear from the facts of

the present case, nor does it appear as a likely consequence in general of a reading of the statute and the regulations which confines them to the plain meaning of the words used. In this case nothing would have prevented the officers from delaying their intervention until Gomez-Londono had been tendered and had filled out a false Form 4790 and then had surrendered his passage coupon, had received his boarding pass, and was ready to board, or had taken his place in the aircraft. The purpose of the Act is not to garner transgressions but to secure disclosure of the currency movements and the identities of those bringing them about.

Count One, framed under 18 U.S.C. 1001, presents different questions. It is easy to say that this is not an entrapment as entrapment is today defined. Hampton v. United States, 1976, 96 Sup.Ct. 1646, 1650, 1652, 1654, and it is not necessary to plunge into the theoretical difficulties with reading Section 1001 as inapplicable to the case in which the Government initiates the inquiry that elicits the response that is made the subject matter of an indictment under Section 1001. See United States v. Chevoor, supra, 526 F.2d at 183 and footnote 10; United States v. Adler, 2d Cir. 1967, 380 F.2d 917, 922. It is not even certain under Section 1001 that

a statement must be a material one, although in the present case the statement relied upon was certainly material to the point involved. And it is accepted Section 1001 lore that reliance upon the statement by the Government need not be shown. While the statute, then, is formidable in its scope and severity, it must in each instance of its application derive the substance of its prohibition from the circumstances in which the statement is used. The statute here underlying Section 1001, 31 U.S.C. 1101(b), is not one concerned with oral statements to investigators, but with written reports on the international transportation of monetary instruments.

For the Government to indict Gomez-Londono for the false answer to the oral interrogation it must show that the interrogation was fair in the circumstances in which it was undertaken and in the light of the purpose of the statute which authorized the inquiry and required the answer. What was done simply elicited a defensive reaction to the exigency of unexpected official questioning a person whose thresh-hold of apprehension was necessarily, on the Government's information about his situation, a very low one indeed.

Gomez-Londono should have been tendered a Form 4790 and have been told that he was free to take as much United States

currency out of the country as he wished, but that he was obliged to report the amount that he was taking, and would then be free to depart with all of the money that he declared. So much was necessary to secure compliance with the Act and to elicit a response on which the Government could proceed with propriety. Gomez-Londono was not a ward of the Government, but when the Government undertakes to interrogate a man in the knowledge that if he gives a truthful answer it will be wholly beneficia. to him, and if he gives an untruthful answer he may commit two crimes, due process of law requires that the interrogation be such that the expected or probable result is compliance with law and not the eliciting of a violation of law.

The episode at JFK does not appear as one in which the Government sought information for a statutory purpose in order to secure compliance with the law and was disappointed in its expectation of a candid response.

The result of the transactions at JFK on February 22d was, then, that the offense of Section 1001 was not committed. As in the case of Count Two, the stipulation of facts taken as a particularization of Count One establishes its insufficiency to charge the offense of Section 1001.

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Count Three charges a very clear-cut violation of 18 U.S.C. 922(e) which makes it unlawful for anyone knowingly to deliver to any common carrier for transportation in foreign commerce to persons other than licensed importers, manufacturers, dealers or collectors any package in which there is any firearm or ammunition without written notice to the carrier that the firearm or ammunition is being transported or, in the case of the legal possessor of a firearm, without delivering the firearm and ammunition into the custody of the pilot or captain of the common carrier for the duration of the trip. Whether Count Three can stand therefore depends wholly on the validity of the search under the warrant.

The affidavit in support of the warrant of attachment is far more complete than is usually the case, and it cannot but have persuaded the Magistrate that the occasion was a most proper one for the issuance of a warrant. No one was before the Magistrate to suggest the legal problems related to prosecutorial conduct which the very completeness of the affidavit might have disclosed to the Magistrate. To say therefore that he acted indiscreetly in granting the warrant is impossible. Nevertheless, having reached the foregoing conclusion as to the nature of the defects in Counts

One and Two of the indictment, it necessarily follows that, practically helpless as the Magistrate was to reach the point determined in this Court, the nature of law requires the conclusion that the affidavit supporting the warrant was insufficient in law. In consequence the defendant's motion to suppress must be granted.

It is accordingly

ORDERED that defendant's motion to suppress defendant's statements of February 22, 1976, and the physical evidence obtained from the person of defendant and upon the execution of the warrant of attachment is in all respects granted.

Brooklyn, New York

November 17, 1976.

U. S. D.

Respectfully submitted,

DAVID G. TRAGER, United States Attorney, Eastern District of New York,

ALVIN A. SCHALL,
Assistant United States Attorney,
Of Counsel.

Form No. USA-52a-6a (Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK COUNTY OF KINGS EASTERN DISTRICT OF NEW YORK, ss:

ALVIN A. SCHALL being duly sworn, says that on the17th	
dey ofJanuary, 1977, I deposited in Mail Chute Drop for mailing in the	
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and	
State of New York, a two copies of the PAGE PROOF OF THE BRIEF FO THE APPELLANT AND APPENDIX FOR THE APPELLANT of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper	R
directed to the person hereinafter named, at the place and address stated below:	
Ivan Fisher, Esq	
410 Park Avenue	
New_York, New_York10022	

Sworn to before me this
17th day of January, 1977

Rully D

alvin a. SCHALL

No. 41 . 182.8

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